

- - - - - x

JOSE ANGEL CARACHURI-ROSENDO, :

Petitioner :

v. : No. 09-60

ERIC H. HOLDER, JR., :

ATTORNEY GENERAL. :

Wednesday, March 31, 2010

APPEARANCES:

NICOLE A. SAHARSKY, ESQ., Assistant to the Solicitor
General, Department of Justice, Washington, D.C.; on
behalf of Respondent.

1	C O N T E N T S	
2	ORAL ARGUMENT OF	PAGE
3	SRI SRINIVASAN, ESQ.	
4	On behalf of the Petitioner	3
5	ORAL ARGUMENT OF	
6	NICOLE A. SAHARSKY, ESQ.	
7	On behalf of the Respondent	29
8	REBUTTAL ARGUMENT OF	
9	SRI SRINIVASAN, ESQ.	
10	On behalf of the Petitioner	56
11		
12		
13		
14		
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		

1 P R O C E E D I N G S

2 (10:14 a.m.)

3 CHIEF JUSTICE ROBERTS: We will hear
4 argument first this morning in Case 09-60,
5 Carachuri-Rosendo v. Holder.

6 Mr. Srinivasan.

7 ORAL ARGUMENT OF SRI SRINIVASAN

8 ON BEHALF OF THE PETITIONER

9 MR. SRINIVASAN: Thank you,
10 Mr. Chief Justice, and may it please the Court:

11 Long-time lawful permanent resident aliens
12 with two convictions for minor drug possession offenses
13 are subject to removal from the United States, but they
14 are not categorically ineligible to seek discretionary
15 relief from removal from the Attorney General based on
16 their connections and deep family ties to the country.
17 Categorical ineligibility for discretionary relief
18 arises under the Immigration and Nationality Act when a
19 permanent resident has been, quote, "convicted of an
20 aggravated felony," close quote, with the relevant
21 category here permanent residents who have been, quote,
22 "convicted of a felony punishable under the Controlled
23 Substances Act," close quote.

24 Individuals, such as Petitioner, who have
25 been convicted of drug possession but as to whom there

1 has been no finding of recidivism, have been convicted
2 of a misdemeanor punishable under the Controlled
3 Substances Act rather than a felony.

4 JUSTICE GINSBURG: Mr. Srinivasan, as a
5 threshold question, is there a mootness problem here,
6 because as I understand it the Petitioner came back to
7 the country illegally and committed another minor crime?
8 But his coming back illegally and being turned away
9 again, as I understand the law, means that he cannot get
10 any dispensation as a result of the illegal entry.

11 So even if we were to hold in your favor
12 now, I take it that he could not -- he would not have
13 any hope of getting any cancellation of removal or any
14 other dispensation. Is that so?

15 MR. SRINIVASAN: That's not correct,
16 Justice Ginsburg, in our view. And the government, it's
17 notable, doesn't make a mootness argument. I think the
18 reason they don't is that the -- in Lopez this Court
19 understood that the initial removal doesn't annul the
20 ability of an individual to get cancellation. And so,
21 as Your Honor correctly observes, the question would be
22 whether the reentry has an affect on the cancellation
23 and the eligibility for cancellation? And it does not
24 because Petitioner was removed again by reinstatement of
25 the original removal order. And so if there is an

1 argument that the initial removal order wasn't good
2 because cancellation should have been granted, that also
3 carries through to the reinstatement.

4 And as a consequence of that procedural
5 context, there is no mootness argument and I think
6 that's why the government doesn't make -- doesn't take
7 that position.

8 But the question before the Court --

9 JUSTICE SCALIA: I -- I -- I'm not sure I
10 understand what you are saying. You are saying that his
11 reentry was not illegal because his removal was illegal?
12 Is that what you are saying?

13 MR. SRINIVASAN: No, it's not that his
14 reentry was not illegal. It's that when he was then
15 again removed, the way that that was accomplished was by
16 reinstatement of the original removal order.

17 JUSTICE SCALIA: I see.

18 MR. SRINIVASAN: And so if the original
19 removal order would have been extinguished by a grant of
20 the cancellation order, then that carries forward to the
21 reinstatement of the original removal -- removal order
22 as well.

23 JUSTICE KENNEDY: But -- but does --

24 MR. SRINIVASAN: Nothing additional happens
25 because of the reentry.

1 JUSTICE KENNEDY: But does it make the --
2 the second unlawful entry now lawful?

3 MR. SRINIVASAN: It doesn't make --

4 JUSTICE KENNEDY: I thought -- I thought --
5 it's a separate offense to enter, to reenter improperly,
6 and -- and that stays no matter, isn't that correct,
7 regardless of the correctness of the prior removal
8 order?

9 MR. SRINIVASAN: It does, Justice Kennedy --

10 JUSTICE KENNEDY: Or am I wrong?

11 MR. SRINIVASAN: -- but I think -- I think
12 the way that gets taken into account is it would be one
13 of the discretionary considerations that the Attorney
14 General could take into account in determining whether
15 to grant discretionary relief in the same way that the
16 original conviction for drug possession could be taken
17 into account. Our position --

18 JUSTICE GINSBURG: I -- I -- I think also in
19 the picture is that he never contested removability.
20 The only thing was the grace: Would -- would he qualify
21 for discretionary relief by the Attorney General? So
22 the -- the removal order itself, I take it, would stand?

23 MR. SRINIVASAN: The removal order would
24 stand, but if cancellation were granted, then he
25 couldn't be removed pursuant to that removal order,

1 because the -- the effect of granting cancellation would
2 be that he is no longer removable. He gets favorable
3 discretionary relief that enables him to stay in the
4 country, and I think the predicate of Your Honor's
5 question is correct, that we don't contest removability.
6 He was removable because of his drug possession -- drug
7 possession conviction.

8 The question is whether he retains
9 eligibility to seek a favorable exercise of relief from
10 the Attorney General based on affirmative equities in
11 his -- in his favor, such as his deep family ties to the
12 country, the presence of United States citizen children
13 here, his lack of connections to the country to which he
14 would be removed, his employment history and
15 considerations of that variety.

16 And the question before the Court is whether
17 he and other individuals who are similarly situated
18 should have an opportunity to make that case to the
19 Attorney General. He is removable. The question is
20 whether the Attorney General is in a -- is in a position
21 to grant him a favorable exercise of discretion.

22 And we think the Attorney General is,
23 because in order to be categorically ineligible for
24 discretionary relief from removal, a permanent resident
25 alien has to have been convicted of a felony punishable

1 under the Controlled Substances Act. And when you have
2 been convicted of drug possession and there has been no
3 finding of recidivism, you have been convicted of a
4 misdemeanor punishable under the Controlled Substances
5 Act.

6 JUSTICE SOTOMAYOR: What elements would a
7 State conviction have to contain to qualify as a finding
8 of recidivism in your view?

9 MR. SRINIVASAN: What elements?

10 JUSTICE SOTOMAYOR: Yes. What would have
11 had to have been determined in a State conviction for
12 you to recognize, under your argument, that it would
13 qualify as a felony under the Controlled Substances Act?

14 MR. SRINIVASAN: Justice Sotomayor, at the
15 very least what would have had to have happened is that
16 he would have had to have been found to be a recidivist
17 under a State provision that attaches sentencing
18 consequences to being found to have been a recidivist.

19 And, so, what you need is an analogous State
20 offense to the Federal offense of recidivist possession.

21 JUSTICE SOTOMAYOR: Do you know of any State
22 law that is analogous to the Federal law, precisely
23 analogous?

24 MR. SRINIVASAN: Well, analogous enough to
25 count, in the sense that what you need under the Federal

1 law is a finding of recidivism at least. That's our
2 principal submission.

3 JUSTICE SOTOMAYOR: That's what I'm trying
4 to -- to get to. What are the elements of that finding?
5 What exactly -- because different labels are attached to
6 different crimes that qualify you for recidivism under
7 some State statutes, et cetera. I'm trying to get you
8 to articulate what finding of recidivism counts, what
9 are the underlying --

10 MR. SRINIVASAN: It's a determination by the
11 court that --

12 JUSTICE SOTOMAYOR: Which court now, the
13 State court?

14 MR. SRINIVASAN: By the State convicting
15 court. In the case of a State conviction, it would be a
16 determination by the State convicting court that the
17 person in fact has a prior conviction. And then as a
18 consequence under the State scheme, a sentencing
19 consequence would attach.

20 JUSTICE SOTOMAYOR: So are you arguing that
21 a State court has to make a finding of a valid prior
22 conviction; is that it?

23 MR. SRINIVASAN: Yes, in -- in the context
24 of a State conviction.

25 JUSTICE SCALIA: But it doesn't have to be a

1 State felony?

2 MR. SRINIVASAN: It doesn't have to be a
3 State felony, no.

4 JUSTICE SCALIA: The felony has to be a
5 Federal felony, right?

6 MR. SRINIVASAN: That's correct. And that's
7 the work done by the words "punishable under the
8 Controlled Substances Act."

9 JUSTICE SCALIA: Punishable as a felony
10 under the Federal act.

11 MR. SRINIVASAN: Right.

12 JUSTICE SCALIA: But this was punishable as
13 a felony because it was his second drug offense. He was
14 a recidivist. And although it was only a misdemeanor
15 under State law, under the Controlled Substances Act he
16 could be prosecuted for a felony, for a Federal felony.
17 I -- I -- I don't know why that doesn't fit the statute.

18 MR. SRINIVASAN: But -- but, Justice Scalia,
19 he has to have been convicted of the felony. That is
20 the critical distinction. He may have committed a
21 felony --

22 JUSTICE SCALIA: He can't be convicted of a
23 Federal felony in a State court. He has to be convicted
24 of a crime --

25 MR. SRINIVASAN: He has to have been

1 convicted of a crime --

2 JUSTICE SCALIA: Which may be a misdemeanor,
3 which would subject him to a felony conviction in
4 Federal court under the Controlled Substances Act. And
5 I think that's - that's what this is. He's convicted of
6 a drug offense and if - if he were prosecuted in Federal
7 court, he would - he was punishable as a felon in
8 Federal court under the - under the Controlled
9 Substances Act.

10 MR. SRINIVASAN: He was not punishable as a
11 felon in Federal court for two reasons. First, he was
12 convicted of drug possession. A person in Federal court
13 who is convicted of drug possession is a misdemeanant,
14 not a felon, unless and until there is a finding that
15 he's a recidivist. You have to have the finding of
16 recidivist in order for a felony sentence even to
17 conceivably attach to an individual, and you just don't
18 have that in the context of this case, where all you
19 have is a conviction of drug possession alone. A felony
20 sentence doesn't even come into the picture unless there
21 is a finding of recidivism. That didn't happen in this
22 case.

23 JUSTICE ALITO: Is the crux of your argument
24 that for present purposes the term "conviction" must
25 include a determination of recidivism?

1 MR. SRINIVASAN: For present purposes,
2 that's correct. And Justice Ali to, I think it's
3 important to understand - and this goes to the second
4 response to your question, Justice Scalia - that the
5 statute, the Immigration and Nationality Act, defines
6 "conviction" in a particular way. It defines
7 "conviction" as "a formal judgment of guilt entered by a
8 court."

9 As Your Honor's opinion for the Court in
10 Deal v. United States understood, statutes could define
11 convictions in one of two ways. It could define a
12 conviction as a finding of guilty or it could define a
13 conviction as a formal judgment based on that finding.
14 Here we have the latter.

15 JUSTICE ALITO: What would you say -- What
16 do you say about 21 U.S.C. section 851, the Federal
17 recidivism provision, which says: "No person who stands
18 convicted of an offense under this part shall be
19 sentenced to increased punishment by reason of one or
20 more prior convictions." So under that statute, a
21 conviction does not include a recidivism determination.

22 MR. SRINIVASAN: Under that statute --
23 different statutes conceive of it different ways, but
24 the applicable definition of "conviction" here, because
25 we are talking about an immigration consequence, is that

1 the definition of "conviction" under the Immigration and
2 Nationality Act. And that definition is set forth at
3 page 2a of the appendix to our brief, the blue brief,
4 the opening brief. And it's 8 U.S.C. 1101(a)(48)(A),
5 and it says that: "The term 'conviction' means with
6 respect to an alien a formal judgment of guilt of the
7 alien entered by a court."

8 So here you have "a formal judgment of
9 guilt" as the operative definition of "conviction," and
10 that formal judgment of guilt includes both the
11 adjudication of guilt and the sentence. And so the
12 important point to bear in mind is that at the time of
13 the conviction as defined by the Immigration and
14 Nationality Act is entered, we know whether the person
15 has been found to have been a recidivist. At that point
16 the adjudication of guilt has happened, the sentence has
17 been imposed and we know whether a finding of recidivism
18 has been made. In the absence of such a finding, the
19 maximum sentence that could attach under Federal law,
20 Justice Scalia, is a misdemeanor sentence of 1 year of
21 imprisonment.

22 A felony sentence is not on the table, and
23 if the maximum sentence to which a person is subject is
24 a misdemeanor sentence, the person has been -- has been
25 convicted of a misdemeanor; they haven't been convicted

1 of a felony.

2 JUSTICE SCALIA: Let's assume we are not
3 talking about immigration consequences. Let's -- let's
4 assume we are talking about an American citizen who has
5 committed a -- a misdemeanor drug offense. When he is
6 brought up under the Controlled Substances Act, even
7 though he wasn't found to have been a recidivist by the
8 State conviction, couldn't he be prosecuted under the
9 Controlled Substances Act for a felony because in fact
10 he is a recidivist?

11 MR. SRINIVASAN: Oh, sure. But -- but I
12 think -- I think that confuses two things. In that
13 situation, the second proceeding is in Federal court,
14 and in that Federal court proceeding you can take
15 account of the prior State court conviction. But in
16 that second proceeding the fact that he was convicted
17 previously in State court would have to have been found
18 by the Federal court. That's the relevant finding of
19 recidivism, and in the absence of that finding of
20 recidivism the Federal defendant wouldn't be subject to
21 a felony sentence. He would only be subject to a
22 misdemeanor sentence.

23 JUSTICE SCALIA: But the crucial word here
24 is "punishable" as a felony under the Controlled
25 Substances Act. And the fact is if indeed he is a

1 recidivist, he could be punished for the -- for the
2 felony. Now, you are quite correct that the Federal
3 court would have to find the recidivism, but -- but
4 still he would be punishable as a recidivist.

5 MR. SRINIVASAN: He has to be convicted of a
6 felony, Justice Scalia, and in the absence of a finding
7 of recidivism he can't have been convicted of the
8 felony. He may be punishable as a felon in the abstract
9 ex ante. So I don't take issue with the proposition
10 that a person commits recidivist possession when they
11 commit possession and they have a prior conviction. In
12 that abstract sense, the person has convicted recidivist
13 possession and if they were charged and found to have
14 been a recidivist they would be convicted of recidivist
15 possession. But in the absence of that finding, they
16 haven't been convicted of recidivist possession.

17 CHIEF JUSTICE ROBERTS: Under the applicable
18 State law, what is required before the recidivist
19 sentence is triggered? Is it a formal finding of
20 recidivism by a jury?

21 MR. SRINIVASAN: It doesn't have to be by a
22 jury, and I think it would depend on the State,
23 Mr. Chief Justice. It doesn't necessarily have to be by
24 a jury, because I think several States have the
25 recidivism component of the offense as a finding that

1 could be made by the court.

2 JUSTICE SCALIA: And we've held that is
3 okay.

4 MR. SRINIVASAN: And you've held that's okay
5 as a constitutional matter.

6 JUSTICE SCALIA: That you don't need a jury.

7 JUSTICE KENNEDY: But we have five States,
8 isn't it, that have no recidivist provisions?

9 MR. SRINIVASAN: There are.

10 JUSTICE KENNEDY: Is the thrust of your
11 argument or the logical consequence of your argument if
12 you have one of those States with no recidivist
13 provisions and you have you ten separate possession
14 convictions, they're still not a recidivist under the
15 Federal rules.

16 MR. SRINIVASAN: It is in those Five states,
17 Justice Kennedy. But I don't think that should give the
18 Court a great deal of pause, for the following two
19 reasons.

20 JUSTICE KENNEDY: No, no. In my
21 hypothetical, what would happen if -- if there was a
22 deportation proceeding?

23 MR. SRINIVASAN: What would happen is this:
24 The person would not be categorically ineligible for
25 discretionary relief.

1 JUSTICE KENNEDY: Because there is no
2 recidivist finding.

3 MR. SRINIVASAN: They wouldn't have been
4 convicted of recidivist possession. But it's important
5 to note, Justice Kennedy, that doesn't mean that those
6 prior convictions don't enter into the picture at all.
7 They do, because in the exercise of discretion by the
8 Attorney General the Attorney General can take into
9 account any prior convictions, including those that
10 don't render somebody categorically ineligible.

11 All we are talking about here is whether the
12 person has a chance to make a discretionary case. They
13 do have that chance in Your Honor's hypothetical, but
14 those convictions will be taken into account.

15 I want to point out, though, that there is
16 another reason that I think the fact that in that
17 hypothetical it wouldn't render the defendant
18 categorically ineligible for discretionary relief
19 shouldn't give the Court a great deal of pause. And
20 that's because the relevant category of aggravated
21 felony that we're talking about here is illicit
22 trafficking in a controlled substance. That's the
23 category that's outlined by the statute.

24 Now, with respect to that category, every
25 State has trafficking laws. Every State punishes drug

1 trafficking. So every State's offenses do count for
2 purposes of this category of aggravated felony. That's
3 the iceberg. The tip of the iceberg is recidivist
4 possession, which is a subset of illicit trafficking in
5 a controlled substance. Now, with respect to that tip,
6 Federal convictions for recidivist possession still do
7 count, so we have those. With respect to the State --

8 CHIEF JUSTICE ROBERTS: But the State
9 prosecutors often prosecute when they have a recidivist
10 provision under that rather than the much more difficult
11 illicit trafficking crime. I mean, if you are going to
12 go to jail for a certain amount of years for a
13 recidivist possession, it's easier to show than illicit
14 trafficking.

15 MR. SRINIVASAN: Well, sure. But if a
16 State -- two responses, Mr. Chief Justice. If a State
17 prosecutor does prosecute under an available recidivist
18 possession offense, then that would count because the
19 State prosecutor would have brought the charge, the
20 finding by hypothesis would have been made. That would
21 be felony recidivist possession under Federal law and
22 there would be categorical ineligibility.

23 Now, I think what may be -- what may be sort
24 of lurking underneath Your Honor's question is the
25 recognition that the Federal consequences of a State

1 conviction are going to turn on State prosecutorial
2 decisions. That's true. But that's a fixed feature of
3 any scheme in which Federal immigration consequences
4 turns on what happens in State court, and this Court's
5 decision in Lopez recognizes that.

6 For example, States -- several States don't
7 have a Federal offense of possession with intent to
8 distribute drugs. That's a Federal offense. What
9 States, some States, have instead is possession with a
10 degree of penalty attached to the amount of drugs
11 possessed. They don't have the separate offense of
12 possession with intent to distribute.

13 Now, the fact that certain States don't have
14 that offense doesn't mean that an individual who is
15 convicted of state possession with no finding of an
16 intent to distribute would be categorically ineligible
17 for discretionary relief from removal, because what
18 Congress understood was that some States will have
19 qualifying offenses and some states won't. In those
20 States that do, where the State has the offense and
21 where the State prosecutor makes the decision to charge
22 under that offense will -- at that point the State
23 conviction will count as a Federal felony. It will be a
24 felony punishable under the Controlled Substances Act
25 and the person in that point would be categorically

1 ineligible for discretionary relief.

2 JUSTICE BREYER: I don't know. It seems to
3 me you go further than you need to and, moreover,
4 imagine a State offense that just says possession of
5 marijuana, zero to 5 years. Now, our problem is,
6 reading those words, is that or is that not analogous to
7 a Federal -- a Federal -- what a Federal law would make
8 a felony. And suppose you discovered as a matter of
9 fact that all the people who did have a prior conviction
10 got more than a year. In simple possession they got
11 less than a year, which you would have to do research to
12 find out.

13 MR. SRINIVASAN: Right.

14 JUSTICE BREYER: Well, if those were the
15 facts I would think it is analogous to the Federal
16 felony where this person was sentenced to more than a
17 year.

18 MR. SRINIVASAN: I don't think it could be,
19 Justice Breyer.

20 JUSTICE BREYER: Well, we could argue that
21 one, but I don't see where there is a line, because it
22 seems to me the rule is set forth, we said in the last
23 sentence here What's the case, you know --

24 MR. SRINIVASAN: Lopez?

25 JUSTICE BREYER: What?

1 MR. SRINIVASAN: Is it Lopez? Was that --

2 JUSTICE BREYER: Yes, Lopez. It says: "A
3 State offense constitutes a felony punishable under the
4 Controlled Substances Act only if it proscribes
5 conduct." So we were not looking at what happened in
6 reality. We are reading some words from a State
7 statute.

8 MR. SRINIVASAN: Correct.

9 JUSTICE BREYER: That's what proscribes
10 conduct punishable as a felony under that Federal law.
11 This would be normal. We get some words in the State
12 statute, and you have to decide: Are the -- do those
13 words cover some events in the world? And you look at
14 those words, what -- the events they cover and discover,
15 did they or are they analogous or not analogous to what
16 is a felony under Federal law? Sometimes that's easy,
17 sometimes it's not.

18 You have a case, I think, that's easy. But
19 I can imagine the case you are talking about, not easy.
20 Well, you say, what do you do? I see no rule there. I
21 see no rule absolute how you treat it, so I probably
22 would treat it by trying to look at what really happens
23 under this statute in the world.

24 MR. SRINIVASAN: Well -- well, with respect,
25 Justice Breyer, I don't think that's the inquiry that's

1 called for even by this sentence. I think what this
2 sentence calls for is an inquiry as to what the State
3 offense captures in its offense elements to make up a
4 conviction.

5 JUSTICE BREYER: Why -- where does it say
6 "offense element"?

7 MR. SRINIVASAN: Because I think that's
8 the -- the necessary --

9 JUSTICE BREYER: Where does it say that?

10 MR. SRINIVASAN: It's -- it's necessarily
11 what's at issue. It -- this sentence doesn't
12 necessarily -- it asks for --

13 JUSTICE BREYER: Well, where in that statute
14 does it say "offense elements"?

15 MR. SRINIVASAN: It asks whether it -- the
16 sentence asks whether the State offense proscribes
17 conduct.

18 JUSTICE BREYER: Yes.

19 MR. SRINIVASAN: And I read "proscribes
20 conduct" to mean there would be offense elements
21 describing conduct.

22 JUSTICE BREYER: So you say that it says
23 "elements." I don't see any of our cases that say "
24 elements." And I -- and I think that -- that what we
25 could do is look to the conduct that's likely to be at

1 issue under these State words, and if in fact it's
2 regular that the State does punish people for more than
3 a year when in fact they do possess for the third time,
4 at least there would be a good argument --

5 MR. SRINIVASAN: Justice Breyer --

6 JUSTICE BREYER: -- that that counts. You
7 want to argue it doesn't count, okay. I don't know why
8 you do.

9 MR. SRINIVASAN: No --

10 JUSTICE BREYER: I mean, I'm interested in
11 why you do, since that isn't your case.

12 MR. SRINIVASAN: I don't want to take
13 issue -- I don't want to argue against myself,
14 certainly, but I would just make the following point:
15 That if I am understanding what Your Honor's saying
16 correctly, and I'm not sure that I am, but if I am
17 understanding what you're saying correctly, I would just
18 point out to the Court that the Court dealt with that
19 sort of situation in the four corners of. Lopez itself
20 when it talked about -- talked about what happens with
21 possession with intent to distribute.

22 Some States don't have possession with
23 intent to distribute as an offense; they only have
24 possession. Now, I -- as I understand what Your Honor's
25 suggesting, you could look at all the -- the ken of

1 individuals who have been convicted of State possession
2 and you could ask as a matter of fact, do they in fact
3 possess with intent to distribute? And then you could
4 reach some consequence on that basis.

5 JUSTICE BREYER: What I'm -- the reason I
6 ask my question is it seems to me your approach, which I
7 think is consistent with Lopez and Nijhawan
8 absolutely --

9 MR. SRINIVASAN: Okay.

10 JUSTICE BREYER: -- does raise the question
11 you are talking about. So I want to know: Why are you
12 talking about it? I might be missing something. I
13 don't think -- if I'm right, your case doesn't raise
14 these issues. Or am I wrong about that?

15 MR. SRINIVASAN: I -- I have to confess, I'm
16 not exactly sure what Your Honor is asking. But so --

17 JUSTICE BREYER: Okay. Well, skip the
18 question.

19 MR. SRINIVASAN: I think --

20 JUSTICE ALITO: Could I ask you this
21 question --

22 JUSTICE SOTOMAYOR: Could I --

23 JUSTICE ALITO: Suppose a State makes simple
24 possession a felony. Now, that doesn't make it a felony
25 for these purposes, right?

1 MR. SRINIVASAN: Right.

2 JUSTICE ALITO: All right. But in
3 sentencing the -- the defendant in State court for this
4 felony, the -- the defendant concedes that he has a
5 prior conviction and the judge finds that and takes that
6 into account in imposing the sentence. What would
7 happen there?

8 MR. SRINIVASAN: It wouldn't constitute the
9 analogy to the Federal offense of recidivist possession,
10 Justice -- Justice Alito, because that could also happen
11 in the Federal system. In the Federal system, you could
12 have an individual who is convicted of possession and
13 then the fact that they had a prior conviction could
14 have some role in the -- for example, in the
15 presentencing report.

16 JUSTICE ALITO: But what's missing there?

17 MR. SRINIVASAN: You don't have --

18 JUSTICE ALITO: What is the difference
19 between that and -- and the situation where just because
20 of the vagary of State law, recidivism is something that
21 has to be proven in order to bring the offense into the
22 -- into the felony realm?

23 MR. SRINIVASAN: Two things that are
24 missing, Justice Alito. First, you don't have a formal
25 judgment of guilt entered by the court, which is what

1 the conviction requires. And the consequence of not
2 having a formal judgment of guilt is that the statutory
3 maximum penalty isn't raised. And I think what is
4 relevant here is that when you have a finding of -- a
5 formal judgment of guilt of recidivism in the Federal
6 system, which happens when the prosecutor brings a
7 charge and the court makes the finding at sentencing,
8 the maximum sentence that could be imposed against the
9 defendant is raised from a misdemeanor sentence to a
10 felony sentence.

11 But that doesn't happen in a situation in
12 which the fact of a prior conviction is taken into
13 account, for example, under a presentencing report. It
14 doesn't raise the statutory maximum, and there is no
15 formal judgment entered based on that determination by
16 the court. So that's the distinction.

17 And I think the relevant way to look at it
18 is, you take account of what would happen in the Federal
19 system and you ask: Would it have the consequence in
20 the Federal system of rendering somebody guilty of the
21 felony of recidivist possession as opposed to the
22 misdemeanor of simple possession? And it wouldn't in
23 the Federal system and by parity of reasoning it also
24 would not have that consequence in the State system.

25 JUSTICE ALITO: That seems to be a totally

1 formalistic distinction that's based on the vagaries of
2 State law. What -- what is the difference between
3 someone who is found by a court under a State recidivism
4 provision to have -- to be eligible for an increased
5 punishment as a result of that finding and someone who
6 is found by a court in the context of sentencing,
7 discretionary sentencing, to have a felony possession,
8 to have a prior -- prior conviction, and receives an
9 increased sentence as a result of that? What is the --
10 is there any functional difference between those two
11 situations?

12 MR. SRINIVASAN: Well, I think there is,
13 Justice Alito, and let me just say as a preliminary
14 matter: It's not based on the vagaries of State law,
15 because it's -- I'm applying the same analysis to State
16 convictions as I do to -- to Federal convictions.

17 But one way to look at it is to ask, suppose
18 that a State or even Federal law made it salient for
19 sentencing purposes whether somebody intended to
20 distribute when they possessed. They were convicted of
21 drug possession. There is an offense of possession with
22 intent to distribute, but they are not charged with that
23 offense.

24 They are charged with drug possession. And
25 then sentencing somehow makes it salient, not for

1 purposes of raising the statutory maximum, but just for
2 purposes of sentencing within the range whether the
3 person intended to distribute. I don't think anybody
4 would say that the individual was convicted of the
5 felony of possession with intent to distribute because
6 the -- the judge in sentencing took into account an
7 intent to distribute in some way under a sentencing
8 scheme.

9 JUSTICE ALITO: Does it matter in that
10 situation that that's an element, that has to be an
11 element of the offense?

12 MR. SRINIVASAN: It has to be a sentencing
13 factor that raises the statutory maximum. And the
14 reason that matters is that under this statute, the
15 person has to have been convicted of a felony. And the
16 only way they are convicted of a felony is the offense
17 of which they are convicted can lead to a felony
18 sentence.

19 And the sentencing factor in this case of
20 recidivism is necessary in order to give rise to a
21 Federal sentence. In the absence of that finding, the
22 person has been convicted of a misdemeanor, because the
23 maximum sentence they can receive is a misdemeanor
24 sentence of 1 year of imprisonment.

25 If the court has no further questions, I

1 would like to reserve the balance of my time for
2 rebuttal.

3 CHIEF JUSTICE ROBERTS: Thank you,
4 Mr. Srinivasan.

5 Ms. Saharsky.

6 ORAL ARGUMENT OF NICOLE A. SAHARSKY
7 ON BEHALF OF THE RESPONDENT

8 MS. SAHARSKY: Mr. Chief Justice, and may it
9 please the Court:

10 Congress's judgment here was that all aliens
11 who engage in the same serious conduct would be treated
12 the same for immigration purposes. And Petitioner
13 doesn't dispute that he has two convictions for drug
14 possession. And he also doesn't dispute that had that
15 second case been prosecuted in Federal court, he could
16 have been punished as a felon. What he is saying is: I
17 don't want my aggravated felony to count because of the
18 difference in State law, because of a difference in the
19 State prosecutor's decision.

20 But what this Court held in Lopez is that
21 Congress's judgment controls about the seriousness of
22 the offense --

23 JUSTICE BREYER: In the exact words of
24 Lopez, which I think are important: "We hold that a
25 State offense constitutes a felony punishable under

1 controlled substance only if it proscribes conduct
2 punishable as a felony," okay?

3 MS. SAHARSKY: Yes.

4 JUSTICE BREYER: Under Federal law. Now,
5 there is an ambiguity when you use a word like "offense"
6 or "crime." Sometimes you mean what this guy did and
7 sometimes you're referring to a statute. It's statutes
8 that proscribe, not what this guy did. So we are
9 talking about the statute. So what it tells us to do --
10 and we said the same thing in *Nijhawan*, and I have
11 written in other opinions the same thing -- you go read
12 the State statute. Forget what he's done. Read the
13 statute and see if the statute proscribes conduct that
14 would amount to a felony under Federal law.

15 So let us read the statute. We turn to the
16 statute of conviction. What it says is it is a class A
17 misdemeanor for which you are punishable of less than a
18 year if you possess less than 28 grams or whatever. It
19 says nothing about recidivism. There is no increased
20 punishment for recidivism.

21 So all we did was read the statute. The
22 statute does not proscribe conduct that would be a
23 felony under Federal law; it proscribes conduct that
24 would be a misdemeanor. QED: this person has not been
25 punished in Texas under a statute that proscribes

1 conduct that would be a felony under Federal law. End
2 of case.

3 Now, what is the matter with what I just
4 said?

5 MS. SAHARSKY: Because this is a two-step
6 inquiry and you only did step one.

7 JUSTICE BREYER: What do you mean, a
8 two-step inquiry?

9 MS. SAHARSKY: A two-step inquiry. There
10 are two questions. The first is: Does the State
11 offense correspond to an offense under the CSA? Does it
12 correspond to a Federal offense, and that is based on
13 the elements, and the Court said that that was based on
14 the elements on page 51 of Nijhawan --

15 JUSTICE BREYER: Okay. Okay.

16 MS. SAHARSKY: But there is a second
17 question, which is if it corresponds to a Federal
18 offense, how would that Federal offense be punishable?
19 The "punishable" under the CSA language determines that
20 we need to look at that second inquiry. If in addition
21 to that --

22 JUSTICE BREYER: No. Where does it say
23 that? Where does it say that in the language?

24 You are looking to the conduct that the
25 statute proscribes, not what he engaged in. Suppose the

1 State statute said it is a misdemeanor to steal a
2 chicken, okay?

3 MS. SAHARSKY: Yes.

4 JUSTICE BREYER: It is a misdemeanor. He is
5 convicted of stealing a chicken. It turns out that the
6 way he stole the chicken was to burn down the farmhouse.

7 (Laughter.)

8 JUSTICE BREYER: That is a felony. Now,
9 what we have written is: Forget the second. I have
10 written it in five opinions or four or three, most of
11 which had a majority.

12 (Laughter.)

13 JUSTICE BREYER: It is called -- it is
14 written right here in this case, it is written in
15 Nijhawan. What is it that tells us to go beyond the
16 conduct that the State statute proscribes, not some
17 other thing?

18 MS. SAHARSKY: The conduct is what the State
19 statute proscribes, but there is an additional question
20 of how it is punishable --

21 JUSTICE BREYER: Where is the additional
22 question? Read me the words of the statute that --
23 there might be. I'm not -- I'm being argumentative, but
24 I want to know what words in the statute say there -- or
25 what words in a case say go look to some other thing

1 beyond what the State statute proscribes?

2 MS. SAHARSKY: Okay. This is on the gray
3 brief, page 10a, and this is the definition that is
4 incorporated into the aggravated felony definition in
5 the INA, and it says that it encompasses, quote, "any
6 felony punishable under the Controlled Substances Act."
7 And in Lopez the Court interpreted that language to mean
8 an offense that is punishable as a felony under the
9 Controlled Substances Act.

10 JUSTICE BREYER: Yes. What offense? The
11 offense proscribed --

12 MS. SAHARSKY: Right.

13 JUSTICE BREYER: -- by State law. That's
14 why I asked you: Where does the State statute proscribe
15 something that has to do with recidivism? I have read
16 that State statute three or four times.

17 MS. SAHARSKY: Recidivism isn't part of the
18 offense. It is a sentencing factor. Justice Scalia
19 mentioned that. That's something this Court has
20 recognized on many occasions, that recidivism is
21 something that can be established by the sentencing
22 court.

23 You are right, the offense is drug
24 possession. He was convicted of drug possession in
25 State court. That's what he would have been convicted

1 of in Federal court. But the fact that he was convicted
2 of drug possession doesn't answer the separate question
3 of how that offense is punishable. If it were his first
4 offense, it would be punishable as a misdemeanor. If it
5 was his second offense, it would be punishable as a
6 felony.

7 And we think that that -- that approach is
8 dictated by two different opinions, the first of which
9 is Lopez, which says we look for a correspondence
10 between the State offense and the Federal offense, but
11 then we also have this question of how the offense is
12 punishable in Federal court, and this punishability
13 question is extremely relevant. The entire basis for
14 the Court's -- the entire basis for the Court's opinion
15 was that Congress's judgment about the seriousness of
16 the offense controls. It is not State by State
17 judgment.

18 JUSTICE GINSBURG: Ms. Saharsky, do we take
19 into account at all -- I mean, in Lopez as I understand
20 it, the petitioner prevailed because it would not have
21 been a felony under the Federal law. Is that right?

22 MS. SAHARSKY: Yes.

23 JUSTICE GINSBURG: Here we are talking about
24 two crimes. One is a small amount of marijuana. He
25 gets 20 days in jail. The other is a pill that I never

1 heard of, a Xan-something, and he get what, 10 days in
2 jail for that. If you could just present this scenario
3 to an intelligent person who didn't go to law school,
4 that you are going to not only remove him from this
5 country, but say never, ever darken our doors again
6 because of one marijuana cigarette and one Xan-something
7 pill -- it -- it just seems to me that if there is a way
8 of reading the statute that would not lead to that
9 absurd result, you would want to read the statute.

10 If you are forced to read it because there
11 is no other way -- but maybe there is another way.

12 MS. SAHARSKY: We don't think that there is
13 another way, because the Court said in Lopez in
14 interpreting the statutory language that the State's
15 judgment about how an offense is punished does not
16 control. What controls is Congress's judgment, and
17 Congress has taken a hard line over the past 20 years on
18 criminal aliens, particularly recidivist criminal
19 aliens --

20 JUSTICE SOTOMAYOR: But in --

21 JUSTICE KENNEDY: Can you tell me what would
22 happen if there -- forget the State. There are two
23 Federal offenses. The first Federal offense is drug
24 possession; the second Federal offense, drug possession,
25 but the prosecutor is not quite sure that he has a

1 strong case or she has a strong case for recidivism
2 because of the first conviction.

3 So the -- on the second go-around, the
4 conviction is without the added finding of recidivism.
5 What does the INA do with that case?

6 MS. SAHARSKY: That would count as an
7 aggravated felony, as punishable as a felony, because
8 the aggravated felony language incorporates the word
9 "punishable," how it could be treated under Federal law,
10 not how it actually was punished. And that's because
11 Congress made a -- a judgment in the immigration code
12 that what it wanted to do was to take all individuals
13 who had been engaged in the same conduct, repeated drug
14 possession, and treat them the same.

15 JUSTICE KENNEDY: Would -- would --

16 JUSTICE SOTOMAYOR: So something's not a
17 Federal felony and it's now subject -- because he hasn't
18 been convicted in Federal court of recidivism -- now
19 he's being punished under the INA or removed under the
20 INA for what is not a felony under Federal -- Federal
21 law?

22 MS. SAHARSKY: Because it's punishable --
23 yes, because it's punishable as a felony under Federal
24 law, because Congress made a judgment that those two
25 drug possession offenses, the fact of recidivism makes

1 it serious enough that it --

2 JUSTICE SOTOMAYOR: Could I just ask you
3 one --

4 JUSTICE KENNEDY: May I -- if I could just
5 finish on this one -- this one. In this hypothetical
6 that we are discussing, the -- the two Federal offenses
7 but no finding of recidivism, does the INA have the
8 authority to question the first conviction because it
9 was uncounseled or in effect collaterally question the
10 first conviction?

11 MS. SAHARSKY: It -- it's well established
12 that those kind of challenges can't be brought in
13 immigration court. What needs to happen is they need to
14 be brought in the State court of conviction through the
15 procedures that are --

16 JUSTICE KENNEDY: No, what -- our
17 hypothetical here is Federal.

18 MS. SAHARSKY: Oh, I'm sorry.

19 JUSTICE KENNEDY: Right.

20 MS. SAHARSKY: In that case if it -- the
21 individual would need to seek relief in Federal court in
22 terms of getting the conviction --

23 JUSTICE GINSBURG: I thought in the
24 conviction in Federal court, and the -- they are going
25 to use it as a recidivist offense, A, the defendant is

1 notified of that; and B, is given an opportunity to say
2 there is something infirm about that first conviction.
3 That's totally absent from this picture.

4 And you say, oh, well, that's just a matter
5 of procedure, so he doesn't have to get that anyplace.
6 I think that Congress is requiring that. It's certainly
7 an element of fundamental due process standards, notice
8 and opportunity to say, no, the first conviction
9 shouldn't count.

10 MS. SAHARSKY: With respect, we disagree
11 because Congress made different judgments in the
12 immigration context than in the criminal context.
13 Immigration is very different from criminal proceedings.
14 This Court has said that on numerous occasions the
15 rights and terms of due process and counsel and the like
16 are very different.

17 And in immigration Congress made a
18 categorical judgment that individuals who have been
19 convicted of conduct should all be treated the same and
20 that they all should be removed from the United States
21 and should be -- not be able to get discretionary
22 relief. In the criminal sentencing context, which you
23 are talking about, section 851 procedures, Congress made
24 a judgment that those procedures which have criminal
25 consequences and already are individualized, that there

1 would be this notice provision. But that provision
2 Congress did not apply anywhere in the immigration laws.
3 And if you look --

4 JUSTICE BREYER: You go ahead.

5 MS. SAHARSKY: I was just going to say, if
6 you look all through the aggravated felony provisions --
7 they are in our briefs; there are 21 of them -- for none
8 of those provisions was Congress concerned about notice
9 and the like. It said the individual has engaged in
10 this conduct that we think is serious.

11 JUSTICE GINSBURG: But my point is that if
12 it all happened in the Federal court, if these two
13 possession offenses all happened in the Federal court,
14 at the time of the second one the -- the defendant would
15 have gotten the notice and the opportunity to knock it
16 out.

17 I'm not talking about immigration, but
18 just -- and he doesn't have that opportunity the way you
19 treat it. He doesn't -- didn't get that in the State
20 court because nobody thought that this was a recidivist
21 offense in the State court.

22 MS. SAHARSKY: That's right. And that's
23 because Congress made the decision to have those types
24 of notice procedures in criminal proceedings, but they
25 are not applicable by their terms anywhere in the

1 immigration laws. And just to make sure that I
2 understand the hypotheticals that you and Justice
3 Kennedy have been talking about, if there is a Federal
4 prosecution and the person has sought to challenge the
5 validity of his conviction and it has been proven to be
6 invalid, then in that case, yes, there would be a
7 question whether that conviction could be used in the
8 immigration proceedings. There is an entire body of law
9 that when a conviction has been vacated, it doesn't
10 count as a conviction under the immigration proceedings.

11 So the answer is if it is a person in State
12 court and they think that there is a problem with their
13 underlying conviction, they need to go to State court or
14 use whatever procedures are available for challenging
15 that. But, again, the Court has said on many occasions
16 prior convictions are presumed valid. We do not -- we
17 do not --

18 JUSTICE GINSBURG: Do we know practically,
19 both on the State side and Federal side, do prosecutors
20 presented with simple possession cases, do they -- do we
21 ever see in real life this combination that somebody's
22 going to be convicted as a recidivist when it's one
23 marijuana cigarette at one time and one pill on another?
24 Do prosecutors, Federal or State, do that?

25 MS. SAHARSKY: I -- I can't speak to State

1 prosecutors. I know there are circumstances in which
2 Federal prosecutors do it, although, quite honestly,
3 most of the Federal drug prosecutions regard the more
4 serious drug crimes. The persons that come to our
5 attention usually can be charged with at least
6 possession with intent to distribute or drug trafficking
7 or something like that. And when we do charge them with
8 possession, it's usually because they pleaded down and
9 we have agreed not to give them an enhanced sentence.

10 But the judgment here is the one that
11 Congress made about whether two drug possessions is
12 serious, serious enough to qualify as a felony. And
13 Congress --

14 JUSTICE BREYER: Can I ask you a related
15 question, which will show what I'm trying -- another
16 thing that is worrying me. Suppose we are in the Armed
17 Career Criminal Act.

18 Now, I have -- this is my hypothetical. You
19 have heard of cat burglars. Well, this gentleman is
20 called the pussycat burglar and the reason is he never
21 harmed a soul. He only carries soft pillows as weapons.
22 If he sees a child, he gives them ice cream.

23 (Laughter.)

24 JUSTICE BREYER: It is absolutely
25 established that this person in breaking into that house

1 at night only wanted to steal a pop gun, and he is the
2 least likely to cause harm in the world.

3 Question: He is convicted of burglary. Is
4 that a crime of violence? Answer?

5 MS. SAHARSKY: Well, to the extent that the
6 burglary definition depends on the Court's modified
7 categorical approach, you just looked at the -- what he
8 has been convicted of and not the individual --

9 JUSTICE BREYER: Correct.

10 MS. SAHARSKY: -- circumstances of the case.

11 JUSTICE BREYER: The answer is of course,
12 because we are not looking to whether he is the pussycat
13 burglar or the cat burglar. We are to look to the
14 statute of conviction and see what it is that that
15 behavior forbids -- that the statute forbids. Rewis,
16 Nijhawan say do precisely the same thing with this part
17 of that long list. Indeed, Nijhawan lists this
18 provision as an example of what you would do the same
19 thing for.

20 Now I'm back to my first question. Let's do
21 it. Read the Texas statute. And where in that Texas
22 statute does it say a word about recidivism or punish
23 that conduct?

24 Now, if I adopted your position, am I not,
25 not simply overturning Rewis and Nijhawan, but getting a

1 very mixed up area of the law which we have tried to
2 straighten out -- Taylor, ACCA -- once again totally
3 mixed up. That's my concern.

4 MS. SAHARSKY: With respect, I think that
5 our position is entirely consistent and, in fact,
6 follows from Lopez and Nijhawan and is consistent with
7 the Court's modified categorical approach.

8 So, let me just talk about Lopez and
9 Nijhawan, because I want to make sure there's not any
10 confusion about that. Lopez said that we have a
11 question here about whether the State offense -- and a
12 State offense is made up of here drug possession;
13 recidivism isn't something that you are convicted of,
14 it's a sentencing factor.

15 You look at the State offense and you see
16 does it correspond to a Federal offense? Here it does.
17 There is State drug possession, there is Federal drug
18 possession. And then you ask another question. And
19 this Court said in Lopez that that's an important
20 question because we care about what Congress thought,
21 which is how is this offense punishable under Federal
22 law.

23 This is a two-part inquiry where the first
24 part, the offense elements, does need to be established
25 in State court; and the second part, which goes to how

1 it is punishable, does not need to be established in
2 State court. And that's exactly what the Court
3 recognized in its opinion under Nijhawan, albeit in a
4 second --

5 JUSTICE SOTOMAYOR: Under the Federal --
6 under the Federal statute it's only punishable on -- for
7 recidivism purposes. The prior conviction was valid,
8 because, as Justice Ginsburg pointed out, the statute
9 permits a defendant to object. Who has the burden of
10 proof of proving validity is irrelevant. It's not
11 punishable as recidivism unless the prior conviction was
12 valid, constitutionally valid.

13 So why isn't that same standard or proof
14 thereof required either in the State conviction under
15 your -- under any theory, or by the IJ? The IJ fails to
16 make that finding, how has he and on what basis has he
17 ruled that there was a valid prior conviction?

18 MS. SAHARSKY: What makes an offense
19 punishable as a felony under the Federal Controlled
20 Substances Act is contained in section 844, which
21 defines the substantive punishments available. It says
22 that drug possession is punishable as a felony in
23 certain circumstances. And this Court in Lopez,
24 particularly in footnote 6, recognized that repeat drug
25 possession qualifies as punishable as a felony and under

1 the CSA --

2 JUSTICE SOTOMAYOR: But only under a process
3 that requires notice --

4 MS. SAHARSKY: Well, this is what is
5 interesting.

6 JUSTICE SOTOMAYOR: -- And --

7 MS. SAHARSKY: I'm sorry. What's
8 interesting is that the Court cited for this provision
9 Section 844(a) which defines the substantive penalties
10 available. It didn't cite -- no one thought was
11 relevant Section 851, which defines procedures that
12 happen after a conviction to impose a certain
13 punishment.

14 So, what we are talking about are these
15 procedures that are necessary. And it's not a finding
16 of a valid conviction. It's -- it's a long set of
17 procedures. There doesn't necessarily need to be a
18 finding of a valid conviction if the defendant doesn't
19 object at all. There's burden shifting, it's very
20 complicated. Congress did not apply it to the
21 immigration code by its terms. It's not applicable to
22 the State by its terms.

23 What the Court said in Lopez in saying -- in
24 footnote 6, the recidivist possession counts as
25 punishable under the CSA. It pointed to Section 844,

1 which defines the penalties available and not anything
2 about procedures. And even conviction --

3 JUSTICE SOTOMAYOR: Counsel, you would
4 suggest then, that even if a prior State court
5 conviction was secured without the advice of counsel,
6 that would qualify as a Federal offense of recidivism?
7 So let's assume this case, that in neither the
8 conviction for the one marijuana stick or the conviction
9 for the one sleeping pill, that if those convictions
10 were secured without the advice of counsel, that would
11 be enough to qualify him as a recidivist under the
12 Federal law.

13 MS. SAHARSKY: Well, that -- that raises a
14 very narrow question that so far, as we are aware, has
15 never been addressed in the immigration context, which
16 is whether there could be a proceeding to challenge the
17 narrow question of a conviction of pain in the complete
18 absence of counsel.

19 This Court said in *Custis* that there -- even
20 though there is a very broad general rule that prior
21 convictions are presumed valid, that in one narrow
22 situation, the complete absence of counsel that a due
23 process type challenge could be brought.

24 Now, that question has never been raised in
25 this case whether such a challenge could be brought in

1 immigration proceedings despite the general rule that
2 there are no such collateral challenges, but that is a
3 different rule and a different body of jurisprudence
4 from this Court the, due process body, as opposed to
5 importing all of the very complicated Section 851
6 procedures into the -- the -- the inquiry here.

7 And just to get back to the --

8 JUSTICE ALITO: Could a -- could a defendant
9 whose prior conviction was under a State recidivism
10 statute claim that that conviction was invalid because
11 that defendant was at that time deprived of the right of
12 counsel? Do you see a difference between that situation
13 and the situation in which -- and the situation in the
14 sort of case we have here with respect to the issue of
15 whether the prior conviction was invalid because of the
16 deprivation and the right of counsel?

17 MR. SRINIVASAN: Yes, I think they are
18 potentially distinguishable. But, you know, this is --
19 this is not a question that has ever come up in the
20 immigration context. It would be a special rule that
21 would be based on the Court's decision, we think, in
22 *Custis* and not anything about punishable referring to
23 Section 851 procedures.

24 JUSTICE ALITO: Well, why is it
25 distinguishable? You could -- you can -- you could

1 challenge -- a person faced with removal could challenge
2 a prior conviction on the ground that there was a
3 deprivation of the right of counsel, whether or not it
4 was pursuant to a recidivism -- whether or not there was
5 a recidivism issue in it, couldn't -- couldn't they?

6 MS. SAHARSKY: Yes, but I think
7 recidivism -- I think there is some confusion in the
8 Court's discussion, perhaps, that recidivism is not an
9 element of the offense. You are never convicted of
10 recidivism. You are convicted of an offense, and you
11 might be subject to an increased punishment for that
12 offense because you are a recidivist.

13 And that's essentially what Petitioner wants
14 here, is to define the State court offense as having an
15 element of recidivism, but there is one thing that is
16 clear from this Court's jurisprudence to this point is
17 that recidivism is separate and unique from anything
18 else that --

19 JUSTICE KENNEDY: What -- what case do I
20 read to establish that?

21 MS. SAHARSKY: That recidivism is separate
22 and unique?

23 JUSTICE KENNEDY: Right.

24 MS. SAHARSKY: Almendarez-Torres would be
25 one. The Court's decision in Rodriguez would be

1 another.

2 JUSTICE KENNEDY: Well, but
3 Almendarez-Torres was a different offense, was it not?
4 I mean this is -- this is a drug offender who -- it's
5 not like a burglar who stops burglary to take up a new
6 trade. This is -- this is a drug offender who continues
7 to repeat under the drug offense law, and I thought the
8 position was that this shows a particular propensity, a
9 particular immoral attitude that is not being corrected.
10 And so that the recidivism makes him a worse person.

11 MS. SAHARSKY: Well, what this Court said in
12 Rodriguez generally about recidivist punishments is you
13 are always being punished for the last offense but
14 you're being punished more severely because it is shown
15 that incapacitation and deterrence isn't working for
16 you.

17 JUSTICE BREYER: That's what was worrying
18 me, that's why I asked the other question. But the --
19 what was worrying me would be a statute where they --
20 it's big enough in the State to cover possession with
21 recidivism or not, and they deal with it at the
22 punishment stage, and I can see your point in respect to
23 that. But that isn't this statute.

24 This statute not only doesn't deal with it
25 at the punishment stage, it's forbidden to take it into

1 account; because what this says is you can only get
2 recidivism if you previously had a conviction for a
3 class A misdemeanor, and the prior conviction here was a
4 class B; and therefore one thing we know about the
5 statute is that under this statute, his behavior as a
6 recidivist is as close to irrelevant as you could make
7 it. That's why I am back to the cat burglar.

8 MS. SAHARSKY: Right. And what -- what I'm
9 suggesting about that State statute is that --and this
10 Court said this in Lopez -- that Congress didn't want
11 those variations in State law to change the treatment
12 for individual offenders.

13 What it wanted, and it did this in
14 aggravated felony provisions, all throughout them, is to
15 identify categories of persons who had done certain
16 conduct that Congress thought was serious enough and
17 treat them all the same for immigration purposes. And
18 the Court said in Lopez, we are not going to make the
19 way that State law treats recidivism -- or we're not
20 going to make State law treats an offense change the
21 outcome. The outcome is going to be based on how
22 Federal law treats the offense.

23 And that's why, to get back to one of my
24 earlier answers to your questions, we think that this
25 Court's decision in Nijhawan is extremely important

1 here, because what the Court recognized in that decision
2 is that Congress in defining an aggravated felony
3 sometimes talks about required elements of the offense
4 and it sometimes talks about extra facts that can be
5 established in the immigration court. In Nijhawan there
6 was a fraud or deceit offense with this extra fact, that
7 this -- amount of \$10,000 or more, and Congress did the
8 same thing in this provision.

9 JUSTICE BREYER: It did? Nijhawan uses this
10 provision as an example of where it didn't.

11 MS. SAHARSKY: Well, we think that that
12 refers to the first part of the definition. There are
13 actually two parts of the definition. This is I think
14 on page -- right at the beginning of the appendix to our
15 brief. If you look at page 1a of the gray brief.

16 You know, there are two different parts
17 here. In 43(b), there is illicit trafficking in a
18 controlled substance including a drug trafficking crime
19 as defined in section 924(c). So this -- this first
20 part, illicit trafficking, is like a generic burglary
21 type offense where you need to just look at whether
22 the -- essentially elements correspond under a modified
23 categorical approach.

24 But then the second part of it, the drug
25 trafficking crime is the one that's defined as a felony

1 punishable under the Controlled Substances Act. And
2 when you look at a felony punishable under a Controlled
3 Substances Act, which this Court interpreted in Lopez as
4 a -- an offense that is punishable under Federal law, it
5 is just like Nijhawan. It is an offense with a certain
6 extra fact. And Nijhawan was a fraud --

7 JUSTICE GINSBURG: May I ask you -- because
8 time is running out. I take it your answer would be the
9 same -- at least these two are misdemeanors were
10 committed a year apart, but if they were 10 years apart,
11 your answer would still be the same?

12 MS. SAHARSKY: Yes, and I think that is
13 because Congress has said when it wants the -- the
14 timing to matter. For example, in the end of the
15 aggravated felony definitions, Congress said it didn't
16 want felony convictions that were more than 15 years old
17 to matter. You know, Congress when it wants something
18 old not to matter, it says so, an older conviction. So
19 we don't think that there would be a difference for that
20 purpose.

21 So I just want to make sure I answered the
22 question. We just think this is like that situation
23 where you have a conviction for a certain type of
24 offense which here is drug possession and an extra fact,
25 how it is punishable under Federal court, and that extra

1 fact can be established in immigration court, it's not
2 the kind thing that this Court has said under
3 Almendarez-Torres needed to be treated like an offense
4 element.

5 I should note that --- and this was a point
6 you made, Justice Breyer, that there was not a
7 recidivist enhancement available in Texas court.
8 Justice Kennedy, that just highlights some of the
9 problems that you identified in terms of the wide
10 variations that we would see in how similarly situated
11 people who have done the same thing, two drug possession
12 offenses, would be treated differently under the
13 immigration laws. And that's just not what Congress
14 intended.

15 We talk in our brief, and there is a long
16 list of differences in State laws -- not only in the
17 State procedures, which vary widely from Federal court,
18 but in the State laws in terms of, you know, if you can
19 consider a second possession offense for recidivist
20 enhancement, or only a third or fourth; whether the
21 first offense has to be final, et cetera, et cetera,
22 etc.

23 These differences would just lead to a -- a
24 patchwork application laws, and if there is any place
25 where we don't want that, it's -- it's in immigration,

1 with respect to immigration consequences.

2 JUSTICE GINSBURG: There was another
3 crime -- I thought a more serious crime, of civil
4 misdemeanor in this picture, but the Texas prosecutor
5 didn't make anything of that. Remind me of what that
6 was, but I thought it was a -- a more grave offense.

7 MS. SAHARSKY: You might be thinking of his
8 prior offense for domestic violence.

9 JUSTICE GINSBURG: Yes.

10 MS. SAHARSKY: That that may have been able
11 to be used to -- to enhance his -- his drug crime to an
12 enhanced sentence. But that -- there wasn't an
13 enhancement sought on that.

14 JUSTICE GINSBURG: Yes --

15 MS. SAHARSKY: That was a -- a 2003
16 conviction.

17 JUSTICE GINSBURG: So we respect that
18 judgment on the part of the prosecutor, not to make it a
19 -- a ground for a recidivist charge, but we don't
20 respect the prosecutor's -- Texas prosecutor saying I'm
21 just going to treat this like it's a first-time
22 misdemeanor; that's it?

23 MS. SAHARSKY: In either case does the
24 prosecutor's judgment matter. What matters is the
25 offense conduct that was established by the conviction

1 in State court. What matter is the offense that the
2 person was convicted of, and if corresponds to a Federal
3 offense that was punishable as a felony in Federal
4 court.

5 It is true that some charges might be
6 brought and some charges may not be brought, and that
7 would impact what a person has been convicted of; so
8 there could be disparities based on that. But what
9 Congress had to balance its need for uniformity with a
10 rule that is administrable, and the rule that it picked
11 was administrable is, let's look at the offense conduct
12 that was established by the conviction. And when you
13 look at that offense conduct you have to ask how it
14 could be punished in Federal court. And it's that
15 punishable language that requires this more hypothetical
16 inquiry on how the events -- how the offense could be
17 treated.

18 And just to summarize, it is clear from the
19 last 20 years that Congress has had a very serious
20 concern about recidivist criminal aliens in the United
21 States, and Congress has made a judgment since 1970 in
22 the drug laws that two drug possession offenses should
23 be punishable as a felony. And under those
24 circumstances a person who concededly has committed
25 those two drug offenses and who concededly if taken to

1 Federal court could have been punished as a felony, just
2 should not be able to escape the aggravated felony
3 designation that Congress intended for all aliens who
4 are similarly situated.

5 If the Court has no further questions, we
6 submit the judgment below should be affirmed.

7 CHIEF JUSTICE ROBERTS: Thank you,
8 Ms. Saharsky.

9 Mr. Srinivasan, you have 4 minutes
10 remaining.

11 REBUTTAL ARGUMENT OF SRI SRINIVASAN
12 ON BEHALF OF THE PETITIONER

13 JUSTICE KENNEDY: We usually think of
14 recidivism when we talk about statistics as being
15 repeated for any crime. This is recidivism of a special
16 kind. It's repeating the same -- the same thing. Is
17 that essential to your argument? I know it's essential
18 to the -- to the Federal statute.

19 MR. SRINIVASAN: Right, and because it's
20 essential to the Federal statute it's necessarily a part
21 of our argument. I don't think our argument would be
22 any different if the Federal statute read differently,
23 but you can only be punishable as a felon under Federal
24 law if you had a prior drug conviction, and if you had a
25 prior drug conviction that was in fact found to exist.

1 And I think, Justice Kennedy, the point I
2 would like to make in rebuttal -- there's two points I
3 would like to make. The first addresses a question you
4 raised concerning what happens in a situation in which
5 the second proceeding is a Federal proceeding rather
6 than a State proceeding, and I think this is important
7 to highlight the government's response.

8 Because if the second proceeding is a
9 Federal proceeding, we have a person who has a prior
10 conviction for drug possession. We have a person who is
11 then prosecuted in Federal court for a second time for
12 drug possession. The prosecutor by hypothesis never
13 brings the initial conviction into play. The court
14 therefore never finds that the person is a recidivist.
15 As a consequence, that person as a matter of law cannot
16 as a matter of law receive a felony sentence. They can
17 only be sentenced as a misdemeanor. But nonetheless,
18 the government would say that they have been, quote,
19 "convicted of a felony, punishable under the Controlled
20 Substances Act," closed quote --

21 JUSTICE SCALIA: How do you --

22 MR. SRINIVASAN: -- even though no felony
23 sentence could be imposed.

24 JUSTICE SCALIA: How do you distinguish
25 Nijhawan? I mean, there what made it a Federal felony

1 was the fact that more than \$10,000 was obtained from
2 the victims. But that was not found in the -- in the
3 State conviction. It simply was not.

4 MR. SRINIVASAN: There were -- there were
5 two things that made it a Federal felony,
6 Justice Scalia. First was it had to be an offense that
7 involved fraud.

8 JUSTICE SCALIA: That's right.

9 MR. SRINIVASAN: And then -- and that had to
10 be found by the convicting court.

11 JUSTICE SCALIA: Right.

12 MR. SRINIVASAN: There was no issue about
13 that.

14 JUSTICE SCALIA: No issue.

15 MR. SRINIVASAN: Our -- our point is that --

16 JUSTICE SCALIA: Well, what about the
17 \$10,000?

18 MR. SRINIVASAN: But the --

19 JUSTICE SCALIA: He was never convicted of
20 having obtained by fraud more than \$10,000 from the
21 victim.

22 MR. SRINIVASAN: But -- but there's a very
23 important textual distinction, Justice Scalia, because
24 under the provision at issue in Nijhawan, the offense
25 had to involve fraud and then there was a separator in

1 which the loss exceeds \$10,000. And the Court focused
2 on the fact that the text read "in which." That was
3 critical, and another thing that was critical in
4 Nijhawan was that if you looked at Federal statutes and
5 asked, were there any as to which the elements would
6 require a loss in excess of \$10,000, there were not.

7 And because of that practical consequence,
8 the Court reached the conclusion that Congress would
9 have intended that the \$10,000 be something that the
10 immigration judge would have found.

11 We have the opposite situation here.

12 JUSTICE SCALIA: You had still have the word
13 "convicted."

14 MR. SRINIVASAN: Sure.

15 JUSTICE SCALIA: Which is what you are
16 relying on. That word was applicable there as much as
17 it is applicable here, and we did not require him to
18 have been convicted of obtaining more than \$10,000.

19 MR. SRINIVASAN: Because, again the test --
20 the text also had "in which," which the Court found
21 critical -- that text is lacking here -- and because the
22 statute would have had no practical consequence, absent
23 the court's interpretation.

24 JUSTICE BREYER: Well, that -- that's not
25 true here, because she got to that argument at the end.

1 And she said, my -- I wrote that, I think, and I -- when
2 I use it as an example or the text uses an example, this
3 provision is one where you don't look to real conduct.

4 She said, that was a mistake, really. It
5 was overstated, because what they are saying is that
6 recidivism analogous to the \$10,000 was meant to be a
7 real conduct aspect, not just offense of conviction, and
8 -- and she gave similar reasons. That's why -- similar
9 reasons are that you either state you're too mixed up in
10 this; it would be too difficult to look at that element
11 itself. And see, she is trying to analogize that to the
12 \$10,000.

13 Now -- now, why isn't that a good analogy?

14 MR. SRINIVASAN: Because for both reasons
15 that the Court found that you could look to the
16 circumstances for Nijhawan, neither of those two reasons
17 applies here. You don't have a textual separator. You
18 don't have the words "in which." All you have is the
19 word "convicted." And you also don't have the
20 consequence that the -- the provision would cease to
21 have any practical implications under our reading.

22 It would absolutely have practical
23 implications under our reading, because anytime a person
24 was found to have been a recidivist and their sentence
25 was raised, their maximum sentence was raised as a

1 consequence, they will have been deemed to have been
2 aggravated felony. But here, that didn't happen. You'd
3 have to understand that in the Federal system, even
4 though an individual could not as a matter of law be
5 sentenced as a felon, they nonetheless would have been
6 deemed to have been convicted of a felony, and tat the
7 very least -- and this is the second point I'd like to
8 make, if I could just -- be sentenced as a felon they
9 would have been deemed to be convicted of a felony.

10 CHIEF JUSTICE ROBERTS: Make your second
11 point short.

12 MR. SRINIVASAN: Thank you,
13 Mr. Chief Justice.

14 Principles of lenity which the government
15 agrees are potentially applicable would dictate ruling
16 in our favor even if you thought that the text was
17 ambiguous. The principles of lenity do apply. An
18 individual who pleads guilty to possession in exchange
19 for a prosecutor's decision to refrain from charging him
20 as a recidivist and therefore, can only be sentenced as
21 a misdemeanor I think should be allowed to be convinced
22 that he has been convicted of a misdemeanor rather than
23 a felony.

24 CHIEF JUSTICE ROBERTS: Thank you, Counsel.
25 The case is submitted.

1 (Whereupon, at 11:15 a.m., the case in the
2 above-entitled matter was submitted.)
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

A	affirmative 7:10	40:11 42:4,11	aspect 60:7	blue 13:3
ability 4:20	affirmed 56:6	52:8,11	Assistant 1:18	body 40:8 47:3,4
able 38:21 54:10	aggravated 3:20	answered 52:21	assume 14:2,4	breaking 41:25
56:2	17:20 18:2	answers 50:24	46:7	Breyer 20:2,14
above-entitled	29:17 33:4	ante 15:9	attach 9:19	20:19,20,25
1:12 62:2	36:7,8 39:6	anybody 28:3	11:17 13:19	21:2,9,25 22:5
absence 13:18	50:14 51:2	anyplace 38:5	attached 9:5	22:9,13,18,22
14:19 15:6,15	52:15 56:2	anytime 60:23	19:10	23:5,6,10 24:5
28:21 46:18,22	61:2	apart 52:10,10	attaches 8:17	24:10,17 29:23
absent 38:3	agreed 41:9	APPEARAN...	attention 41:5	30:4 31:7,15
59:22	agrees 61:15	1:15	attitude 49:9	31:22 32:4,8
absolute 21:21	ahead 39:4	appendix 13:3	Attorney 1:7	32:13,21 33:10
absolutely 24:8	albeit 44:3	51:14	3:15 6:13,21	33:13 39:4
41:24 60:22	Ali 12:2	applicable 12:24	7:10,19,20,22	41:14,24 42:9
abstract 15:8,12	alien 7:25 13:6,7	15:17 39:25	17:8,8	42:11 49:17
absurd 35:9	aliens 3:11	45:21 59:16,17	authority 37:8	51:9 53:6
ACCA 43:2	29:10 35:18,19	61:15	available 18:17	59:24
accomplished	55:20 56:3	application	40:14 44:21	brief 13:3,3,4
5:15	Alito 11:23	53:24	45:10 46:1	33:3 51:15,15
account 6:12,14	12:15 24:20,23	applies 60:17	53:7	53:15
6:17 14:15	25:2,10,16,18	apply 39:2 45:20	aware 46:14	briefs 39:7
17:9,14 25:6	25:24 26:25	61:17	a.m 1:14 3:2	bring 25:21
26:13,18 28:6	27:13 28:9	applying 27:15	62:1	brings 26:6
34:19 50:1	47:8,24	approach 24:6		57:13
act 3:18,23 4:3	allowed 61:21	34:7 42:7 43:7	B	broad 46:20
8:1,5,13 10:8	Almendarez-...	51:23	B 38:1 50:4	brought 14:6
10:10,15 11:4	48:24 49:3	area 43:1	back 4:6,8 42:20	18:19 37:12,14
11:9 12:5 13:2	53:3	argue 20:20	47:7 50:7,23	46:23,25 55:6
13:14 14:6,9	ambiguity 30:5	23:7,13	balance 29:1	55:6
14:25 19:24	ambiguous	arguing 9:20	55:9	burden 44:9
21:4 33:6,9	61:17	argument 1:13	based 3:15 7:10	45:19
41:17 44:20	American 14:4	2:2,5,8 3:4,7	12:13 26:15	burglar 41:20
52:1,3 57:20	amount 18:12	4:17 5:1,5 8:12	27:1,14 31:12	42:13,13 49:5
added 36:4	19:10 30:14	11:23 16:11,11	31:13 47:21	50:7
addition 31:20	34:24 51:7	23:4 29:6	50:21 55:8	burglars 41:19
additional 5:24	analogize 60:11	56:11,17,21,21	basis 24:4 34:13	burglary 42:3,6
32:19,21	analogous 8:19	59:25	34:14 44:16	49:5 51:20
addressed 46:15	8:22,23,24	argumentative	bear 13:12	burn 32:6
addresses 57:3	20:6,15 21:15	32:23	beginning 51:14	
adjudication	21:15 60:6	arises 3:18	behalf 1:16,20	C
13:11,16	analogy 25:9	Armed 41:16	2:4,7,10 3:8	C 2:1 3:1
administrable	60:13	articulate 9:8	29:7 56:12	called 22:1
55:10,11	analysis 27:15	asked 33:14	behavior 42:15	32:13 41:20
adopted 42:24	ANGEL 1:3	49:18 59:5	50:5	calls 22:2
advice 46:5,10	annul 4:19	asking 24:16	beyond 32:15	cancellation
affect 4:22	answer 34:2	asks 22:12,15,16	33:1	4:13,20,22,23
			big 49:20	5:2,20 6:24 7:1

captures 22:3	46:16,23,25	40:21	51:2,7 52:13	19:24 21:4
Carachuri-Ro...	48:1,1	come 11:20 41:4	52:15,17 53:13	30:1 33:6,9
1:3 3:5	challenges 37:12	47:19	55:9,19,21	44:19 51:18
care 43:20	47:2	coming 4:8	56:3 59:8	52:1,2 57:19
Career 41:17	challenging	commit 15:11	Congress's	controls 29:21
carries 5:3,20	40:14	commits 15:10	29:10,21 34:15	34:16 35:16
41:21	chance 17:12,13	committed 4:7	35:16	convicted 3:19
case 3:4 7:18	change 50:11,20	10:20 14:5	connections	3:22,25 4:1
9:15 11:18,22	charge 18:19	52:10 55:24	3:16 7:13	7:25 8:2,3
17:12 20:23	19:21 26:7	complete 46:17	consequence 5:4	10:19,22,23
21:18,19 23:11	41:7 54:19	46:22	9:18,19 12:25	11:1,5,12,13
24:13 28:19	charged 15:13	complicated	16:11 24:4	12:18 13:25,25
29:15 31:2	27:22,24 41:5	45:20 47:5	26:1,19,24	14:16 15:5,7
32:14,25 36:1	charges 55:5,6	component	57:15 59:7,22	15:12,14,16
36:1,5 37:20	charging 61:19	15:25	60:20 61:1	17:4 19:15
40:6 42:10	chicken 32:2,5,6	concededly	consequences	24:1 25:12
46:7,25 47:14	Chief 3:3,10	55:24,25	8:18 14:3	27:20 28:4,15
48:19 54:23	15:17,23 18:8	concedes 25:4	18:25 19:3	28:16,17,22
61:25 62:1	18:16 29:3,8	conceivably	38:25 54:1	32:5 33:24,25
cases 22:23	56:7 61:10,13	11:17	consider 53:19	34:1 36:18
40:20	61:24	conceive 12:23	considerations	38:19 40:22
cat 41:19 42:13	child 41:22	concern 43:3	6:13 7:15	42:3,8 43:13
50:7	children 7:12	55:20	consistent 24:7	48:9,10 55:2,7
categorical 3:17	cigarette 35:6	concerned 39:8	43:5,6	57:19 58:19
18:22 38:18	40:23	concerning 57:4	constitute 25:8	59:13,18 60:19
42:7 43:7	circumstances	conclusion 59:8	constitutes 21:3	61:6,9,22
51:23	41:1 42:10	conduct 21:5,10	29:25	convicting 9:14
categorically	44:23 55:24	22:17,20,21,25	constitutional	9:16 58:10
3:14 7:23	60:16	29:11 30:1,13	16:5	conviction 6:16
16:24 17:10,18	cite 45:10	30:22,23 31:1	constitutionally	7:7 8:7,11 9:15
19:16,25	cited 45:8	31:24 32:16,18	44:12	9:17,22,24
categories 50:15	citizen 7:12 14:4	36:13 38:19	contain 8:7	11:3,19,24
category 3:21	civil 54:3	39:10 42:23	contained 44:20	12:6,7,12,13
17:20,23,24	claim 47:10	50:16 54:25	contest 7:5	12:21,24 13:1
18:2	class 30:16 50:3	55:11,13 60:3	contested 6:19	13:5,9,13 14:8
cause 42:2	50:4	60:7	context 5:5 9:23	14:15 15:11
cease 60:20	clear 48:16	confess 24:15	11:18 27:6	19:1,23 20:9
certain 18:12	55:18	confuses 14:12	38:12,12,22	22:4 25:5,13
19:13 44:23	close 3:20,23	confusion 43:10	46:15 47:20	26:1,12 27:8
45:12 50:15	50:6	48:7	continues 49:6	30:16 36:2,4
52:5,23	closed 57:20	Congress 19:18	control 35:16	37:8,10,14,22
certainly 23:14	code 36:11	35:17 36:11,24	controlled 3:22	37:24 38:2,8
38:6	45:21	38:6,11,17,23	4:2 8:1,4,13	40:5,7,9,10,13
cetera 9:7 53:21	collateral 47:2	39:2,8,23	10:8,15 11:4,8	42:14 44:7,11
53:21	collaterally 37:9	41:11,13 43:20	14:6,9,24	44:14,17 45:12
challenge 40:4	combination	45:20 50:10,16	17:22 18:5	45:16,18 46:2

46:5,8,8,17 47:9,10,15 48:2 50:2,3 52:18,23 54:16 54:25 55:12 56:24,25 57:10 57:13 58:3 60:7 convictions 3:12 12:11,20 16:14 17:6,9,14 18:6 27:16,16 29:13 40:16 46:9,21 52:16 convinced 61:21 corners 23:19 correct 4:15 6:6 7:5 10:6 12:2 15:2 21:8 42:9 corrected 49:9 correctly 4:21 23:16,17 correctness 6:7 correspond 31:11,12 43:16 51:22 correspondence 34:9 corresponds 31:17 55:2 counsel 38:15 46:3,5,10,18 46:22 47:12,16 48:3 61:24 count 8:25 18:1 18:7,18 19:23 23:7 29:17 36:6 38:9 40:10 country 3:16 4:7 7:4,12,13 35:5 counts 9:8 23:6 45:24 course 42:11 court 1:1,13 3:10 4:18 5:8	7:16 9:11,12 9:13,15,16,21 10:23 11:4,7,8 11:11,12 12:8 12:9 13:7 14:13,14,15,17 14:18 15:3 16:1,18 17:19 19:4 23:18,18 25:3,25 26:7 26:16 27:3,6 28:25 29:9,15 29:20 31:13 33:7,19,22,25 34:1,12 35:13 36:18 37:13,14 37:21,24 38:14 39:12,13,20,21 40:12,13,15 43:19,25 44:2 44:2,23 45:8 45:23 46:4,19 47:4 48:14 49:11 50:10,18 51:1,5 52:3,25 53:1,2,7,17 55:1,4,14 56:1 56:5 57:11,13 58:10 59:1,8 59:20 60:15 court's 19:4 34:14,14 42:6 43:7 47:21 48:8,16,25 50:25 59:23 cover 21:13,14 49:20 cream 41:22 crime 4:7 10:24 11:1 18:11 30:6 42:4 51:18,25 54:3 54:3,11 56:15 crimes 9:6 34:24 41:4 criminal 35:18	35:18 38:12,13 38:22,24 39:24 41:17 55:20 critical 10:20 59:3,3,21 crucial 14:23 crux 11:23 CSA 31:11,19 45:1,25 Custis 46:19 47:22 <hr/> D <hr/> D 3:1 darken 35:5 days 34:25 35:1 deal 12:10 16:18 17:19 49:21,24 dealt 23:18 deceit 51:6 decide 21:12 decision 19:5,21 29:19 39:23 47:21 48:25 50:25 51:1 61:19 decisions 19:2 deemed 61:1,6,9 deep 3:16 7:11 defendant 14:20 17:17 25:3,4 26:9 37:25 39:14 44:9 45:18 47:8,11 define 12:10,11 12:12 48:14 defined 13:13 51:19,25 defines 12:5,6 44:21 45:9,11 46:1 defining 51:2 definition 12:24 13:1,2,9 33:3,4 42:6 51:12,13 definitions 52:15	degree 19:10 Department 1:19 depend 15:22 depends 42:6 deportation 16:22 deprivation 47:16 48:3 deprived 47:11 describing 22:21 designation 56:3 despite 47:1 determination 9:10,16 11:25 12:21 26:15 determined 8:11 determines 31:19 determining 6:14 deterrence 49:15 dictate 61:15 dictated 34:8 difference 25:18 27:2,10 29:18 29:18 47:12 52:19 differences 53:16,23 different 9:5,6 12:23,23 34:8 38:11,13,16 47:3,3 49:3 51:16 56:22 differently 53:12 56:22 difficult 18:10 60:10 disagree 38:10 discover 21:14 discovered 20:8 discretion 7:21 17:7 discretionary	3:14,17 6:13 6:15,21 7:3,24 16:25 17:12,18 19:17 20:1 27:7 38:21 discussing 37:6 discussion 48:8 disparities 55:8 dispensation 4:10,14 dispute 29:13,14 distinction 10:20 26:16 27:1 58:23 distinguish 57:24 distinguishable 47:18,25 distribute 19:8 19:12,16 23:21 23:23 24:3 27:20,22 28:3 28:5,7 41:6 domestic 54:8 doors 35:5 drug 3:12,25 6:16 7:6,6 8:2 10:13 11:6,12 11:13,19 14:5 17:25 27:21,24 29:13 33:23,24 34:2 35:23,24 36:13,25 41:3 41:4,6,11 43:12,17,17 44:22,24 49:4 49:6,7 51:18 51:24 52:24 53:11 54:11 55:22,22,25 56:24,25 57:10 57:12 drugs 19:8,10 due 38:7,15 46:22 47:4 D.C 1:9,16,19
---	---	---	---	---

<p>E</p> <p>E 2:1 3:1,1 earlier 50:24 easier 18:13 easy 21:16,18,19 effect 7:1 37:9 either 44:14 54:23 60:9 element 22:6 28:10,11 38:7 48:9,15 53:4 60:10 elements 8:6,9 9:4 22:3,14,20 22:23,24 31:13 31:14 43:24 51:3,22 59:5 eligibility 4:23 7:9 eligible 27:4 employment 7:14 enables 7:3 encompasses 33:5 engage 29:11 engaged 31:25 36:13 39:9 enhance 54:11 enhanced 41:9 54:12 enhancement 53:7,20 54:13 enter 6:5 17:6 entered 12:7 13:7,14 25:25 26:15 entire 34:13,14 40:8 entirely 43:5 entry 4:10 6:2 equities 7:10 ERIC 1:6 escape 56:2 ESQ 1:16,18 2:3 2:6,9</p>	<p>essential 56:17 56:17,20 essentially 48:13 51:22 establish 48:20 established 33:21 37:11 41:25 43:24 44:1 51:5 53:1 54:25 55:12 et 9:7 53:21,21 events 21:13,14 55:16 ex 15:9 exact 29:23 exactly 9:5 24:16 44:2 example 19:6 25:14 26:13 42:18 51:10 52:14 60:2,2 exceeds 59:1 excess 59:6 exchange 61:18 exercise 7:9,21 17:7 exist 56:25 extent 42:5 extinguished 5:19 extra 51:4,6 52:6,24,25 extremely 34:13 50:25</p> <p>F</p> <p>faced 48:1 fact 9:17 14:9,16 14:25 17:16 19:13 20:9 23:1,3 24:2,2 25:13 26:12 34:1 36:25 43:5 51:6 52:6 52:24 53:1 56:25 58:1 59:2</p>	<p>factor 28:13,19 33:18 43:14 facts 20:15 51:4 fails 44:15 family 3:16 7:11 far 46:14 farmhouse 32:6 favor 4:11 7:11 61:16 favorable 7:2,9 7:21 feature 19:2 Federal 8:20,22 8:25 10:5,10 10:16,23 11:4 11:6,8,11,12 12:16 13:19 14:13,14,18,20 15:2 16:15 18:6,21,25 19:3,7,8,23 20:7,7,7,15 21:10,16 25:9 25:11,11 26:5 26:18,20,23 27:16,18 28:21 29:15 30:4,14 30:23 31:1,12 31:17,18 34:1 34:10,12,21 35:23,23,24 36:9,17,18,20 36:20,23 37:6 37:17,21,24 39:12,13 40:3 40:19,24 41:2 41:3 43:16,17 43:21 44:5,6 44:19 46:6,12 50:22 52:4,25 53:17 55:2,3 55:14 56:1,18 56:20,22,23 57:5,9,11,25 58:5 59:4 61:3 felon 11:7,11,14</p>	<p>15:8 29:16 56:23 61:5,8 felony 3:20,22 4:3 7:25 8:13 10:1,3,4,5,9,13 10:16,16,19,21 10:23 11:3,16 11:19 13:22 14:1,9,21,24 15:2,6,8 17:21 18:2,21 19:23 19:24 20:8,16 21:3,10,16 24:24,24 25:4 25:22 26:10,21 27:7 28:5,15 28:16,17 29:17 29:25 30:2,14 30:23 31:1 32:8 33:4,6,8 34:6,21 36:7,7 36:8,17,20,23 39:6 41:12 44:19,22,25 50:14 51:2,25 52:2,15,16 55:3,23 56:1,2 57:16,19,22,25 58:5 61:2,6,9 61:23 final 53:21 find 15:3 20:12 finding 4:1 8:3,7 9:1,4,8,21 11:14,15,21 12:12,13 13:17 13:18 14:18,19 15:6,15,19,25 17:2 18:20 19:15 26:4,7 27:5 28:21 36:4 37:7 44:16 45:15,18 finds 25:5 57:14 finish 37:5 first 3:4 11:11</p>	<p>25:24 31:10 34:3,8 35:23 36:2 37:8,10 38:2,8 42:20 43:23 51:12,19 53:21 57:3 58:6 first-time 54:21 fit 10:17 five 16:7,16 32:10 fixed 19:2 focused 59:1 following 16:18 23:14 follows 43:6 footnote 44:24 45:24 forbidden 49:25 forbids 42:15,15 forced 35:10 forget 30:12 32:9 35:22 formal 12:7,13 13:6,8,10 15:19 25:24 26:2,5,15 formalistic 27:1 forth 13:2 20:22 forward 5:20 found 8:16,18 13:15 14:7,17 15:13 27:3,6 56:25 58:2,10 59:10,20 60:15 60:24 four 23:19 32:10 33:16 fourth 53:20 fraud 51:6 52:6 58:7,20,25 functional 27:10 fundamental 38:7 further 20:3 28:25 56:5</p>
--	--	--	--	---

G	granting 7:1	18:24 23:15,24	importing 47:5	31:20 43:23
G 3:1	grave 54:6	hope 4:13	impose 45:12	47:6 55:16
general 1:7,19	gray 33:2 51:15	house 41:25	imposed 13:17	intelligent 35:3
3:15 6:14,21	great 16:18	hypothesis	26:8 57:23	intended 27:19
7:10,19,20,22	17:19	18:20 57:12	imposing 25:6	28:3 53:14
17:8,8 46:20	ground 48:2	hypothetical	imprisonment	56:3 59:9
47:1	54:19	16:21 17:13,17	13:21 28:24	intent 19:7,12
generally 49:12	guilt 12:7 13:6,9	37:5,17 41:18	improperly 6:5	19:16 23:21,23
generic 51:20	13:10,11,16	55:15	INA 33:5 36:5	24:3 27:22
gentleman 41:19	25:25 26:2,5	hypotheticals	36:19,20 37:7	28:5,7 41:6
getting 4:13	guilty 12:12	40:2	incapacitation	interested 23:10
37:22 42:25	26:20 61:18		49:15	interesting 45:5
Ginsburg 4:4,16	gun 42:1	I	include 11:25	45:8
6:18 34:18,23	guy 30:6,8	ice 41:22	12:21	interpretation
37:23 39:11		iceberg 18:3,3	includes 13:10	59:23
40:18 44:8	H	identified 53:9	including 17:9	interpreted 33:7
52:7 54:2,9,14	H 1:6	identify 50:15	51:18	52:3
54:17	happen 11:21	IJ 44:15,15	incorporated	interpreting
give 16:17 17:19	16:21,23 25:7	illegal 4:10 5:11	33:4	35:14
28:20 41:9	25:10 26:11,18	5:11,14	incorporates	invalid 40:6
given 38:1	35:22 37:13	illegally 4:7,8	36:8	47:10,15
gives 41:22	45:12 61:2	illicit 17:21 18:4	increased 12:19	involve 58:25
go 18:12 20:3	happened 8:15	18:11,13 51:17	27:4,9 30:19	involved 58:7
30:11 32:15,25	13:16 21:5	51:20	48:11	irrelevant 44:10
35:3 39:4	39:12,13	imagine 20:4	individual 4:20	50:6
40:13	happens 5:24	21:19	11:17 19:14	issue 15:9 22:11
goes 12:3 43:25	19:4 21:22	immigration	25:12 28:4	23:1,13 47:14
going 18:11 19:1	23:20 26:6	3:18 12:5,25	37:21 39:9	48:5 58:12,14
35:4 37:24	57:4	13:1,13 14:3	42:8 50:12	58:24
39:5 40:22	hard 35:17	19:3 29:12	61:4,18	issues 24:14
50:18,20,21	harm 42:2	36:11 37:13	individualized	
54:21	harmed 41:21	38:12,13,17	38:25	J
good 5:1 23:4	hear 3:3	39:2,17 40:1,8	individuals 3:24	jail 18:12 34:25
60:13	heard 35:1	40:10 45:21	7:17 24:1	35:2
gotten 39:15	41:19	46:15 47:1,20	36:12 38:18	JOSE 1:3
government	held 16:2,4	50:17 51:5	ineligibility 3:17	JR 1:6
4:16 5:6 57:18	29:20	53:1,13,25	18:22	judge 25:5 28:6
61:14	highlight 57:7	54:1 59:10	ineligible 3:14	59:10
government's	highlights 53:8	immoral 49:9	7:23 16:24	judgment 12:7
57:7	history 7:14	impact 55:7	17:10,18 19:16	12:13 13:6,8
go-around 36:3	hold 4:11 29:24	implications	20:1	13:10 25:25
grace 6:20	Holder 1:6 3:5	60:21,23	infirm 38:2	26:2,5,15
grams 30:18	honestly 41:2	important 12:3	initial 4:19 5:1	29:10,21 34:15
grant 5:19 6:15	Honor 4:21	13:12 17:4	57:13	34:17 35:15,16
7:21	24:16	29:24 43:19	inquiry 21:25	36:11,24 38:18
granted 5:2 6:24	Honor's 7:4	50:25 57:6	22:2 31:6,8,9	38:24 41:10
	12:9 17:13	58:23		54:18,24 55:21

56:6 judgments 38:11 jurisprudence 47:3 48:16 jury 15:20,22,24 16:6 Justice 1:19 3:3 3:10 4:4,16 5:9 5:17,23 6:1,4,9 6:10,18 8:6,10 8:14,21 9:3,12 9:20,25 10:4,9 10:12,18,22 11:2,23 12:2,4 12:15 13:20 14:2,23 15:6 15:17,23 16:2 16:6,7,10,17 16:20 17:1,5 18:8,16 20:2 20:14,19,20,25 21:2,9,25 22:5 22:9,13,18,22 23:5,6,10 24:5 24:10,17,20,22 24:23 25:2,10 25:10,16,18,24 26:25 27:13 28:9 29:3,8,23 30:4 31:7,15 31:22 32:4,8 32:13,21 33:10 33:13,18 34:18 34:23 35:20,21 36:15,16 37:2 37:4,16,19,23 39:4,11 40:2 40:18 41:14,24 42:9,11 44:5,8 45:2,6 46:3 47:8,24 48:19 48:23 49:2,17 51:9 52:7 53:6 53:8 54:2,9,14 54:17 56:7,13	57:1,21,24 58:6,8,11,14 58:16,19,23 59:12,15,24 61:10,13,24 <hr/> K ken 23:25 Kennedy 5:23 6:1,4,9,10 16:7 16:10,17,20 17:1,5 35:21 36:15 37:4,16 37:19 40:3 48:19,23 49:2 53:8 56:13 57:1 kind 37:12 53:2 56:16 knock 39:15 know 8:21 10:17 13:14,17 20:2 20:23 23:7 24:11 32:24 40:18 41:1 47:18 50:4 51:16 52:17 53:18 56:17 <hr/> L labels 9:5 lack 7:13 lacking 59:21 language 31:19 31:23 33:7 35:14 36:8 55:15 Laughter 32:7 32:12 41:23 law 4:9 8:22,22 9:1 10:15 13:19 15:18 18:21 20:7 21:10,16 25:20 27:2,14,18 29:18 30:4,14 30:23 31:1	33:13 34:21 35:3 36:9,21 36:24 40:8 43:1,22 46:12 49:7 50:11,19 50:20,22 52:4 56:24 57:15,16 61:4 lawful 3:11 6:2 laws 17:25 39:2 40:1 53:13,16 53:18,24 55:22 lead 28:17 35:8 53:23 lenity 61:14,17 let's 14:2,3,3 42:20 46:7 55:11 life 40:21 line 20:21 35:17 list 42:17 53:16 lists 42:17 logical 16:11 long 42:17 45:16 53:15 longer 7:2 Long-time 3:11 look 21:13,22 22:25 23:25 26:17 27:17 31:20 32:25 34:9 39:3,6 42:13 43:15 51:15,21 52:2 55:11,13 60:3 60:10,15 looked 42:7 59:4 looking 21:5 31:24 42:12 Lopez 4:18 19:5 20:24 21:1,2 23:19 24:7 29:20,24 33:7 34:9,19 35:13 43:6,8,10,19 44:23 45:23	50:10,18 52:3 loss 59:1,6 lurking 18:24 <hr/> M majority 32:11 March 1:10 marijuana 20:5 34:24 35:6 40:23 46:8 matter 1:12 6:6 16:5 20:8 24:2 27:14 28:9 31:3 38:4 52:14,17,18 54:24 55:1 57:15,16 61:4 62:2 matters 28:14 54:24 maximum 13:19 13:23 26:3,8 26:14 28:1,13 28:23 60:25 mean 17:5 18:11 19:14 22:20 23:10 30:6 31:7 33:7 34:19 49:4 57:25 means 4:9 13:5 meant 60:6 mentioned 33:19 mind 13:12 minor 3:12 4:7 minutes 56:9 misdemeanant 11:13 57:17 misdemeanor 4:2 8:4 10:14 11:2 13:20,24 13:25 14:5,22 26:9,22 28:22 28:23 30:17,24 32:1,4 34:4 50:3 54:4,22	61:21,22 misdemeanors 52:9 missing 24:12 25:16,24 mistake 60:4 mixed 43:1,3 60:9 modified 42:6 43:7 51:22 mootness 4:5,17 5:5 morning 3:4 <hr/> N N 2:1,1 3:1 narrow 46:14,17 46:21 Nationality 3:18 12:5 13:2,14 necessarily 15:23 22:10,12 45:17 56:20 necessary 22:8 28:20 45:15 need 8:19,25 16:6 20:3 31:20 37:13,21 40:13 43:24 44:1 45:17 51:21 55:9 needed 53:3 needs 37:13 neither 46:7 60:16 never 6:19 34:25 35:5 41:20 46:15,24 48:9 57:12,14 58:19 new 49:5 NICOLE 1:18 2:6 29:6 night 42:1 Nijhawan 24:7 30:10 31:14 32:15 42:16,17 42:25 43:6,9
---	--	--	--	---

44:3 50:25 51:5,9 52:5,6 57:25 58:24 59:4 60:16 normal 21:11 notable 4:17 note 17:5 53:5 notice 38:7 39:1 39:8,15,24 45:3 notified 38:1 numerous 38:14	49:3,7,13 50:20,22 51:3 51:6,21 52:4,5 52:24 53:3,19 53:21 54:6,8 54:25 55:1,3 55:11,13,16 58:6,24 60:7 offenses 3:12 18:1 19:19 35:23 36:25 37:6 39:13 53:12 55:22,25 oh 14:11 37:18 38:4 okay 16:3,4 23:7 24:9,17 30:2 31:15,15 32:2 33:2 old 52:16,18 older 52:18 once 43:2 opening 13:4 operative 13:9 opinion 12:9 34:14 44:3 opinions 30:11 32:10 34:8 opportunity 7:18 38:1,8 39:15,18 opposed 26:21 47:4 opposite 59:11 oral 1:12 2:2,5 3:7 29:6 order 4:25 5:1 5:16,19,20,21 6:8,22,23,25 7:23 11:16 25:21 28:20 original 4:25 5:16,18,21 6:16 outcome 50:21 50:21	outlined 17:23 overstated 60:5 overturning 42:25 <hr/> P <hr/> P 3:1 page 2:2 13:3 31:14 33:3 51:14,15 pain 46:17 parity 26:23 part 12:18 33:17 42:16 43:24,25 51:12,20,24 54:18 56:20 particular 12:6 49:8,9 particularly 35:18 44:24 parts 51:13,16 patchwork 53:24 pause 16:18 17:19 penalties 45:9 46:1 penalty 19:10 26:3 people 20:9 23:2 53:11 permanent 3:11 3:19,21 7:24 permits 44:9 person 9:17 11:12 12:17 13:14,23,24 15:10,12 16:24 17:12 19:25 20:16 28:3,15 28:22 30:24 35:3 40:4,11 41:25 48:1 49:10 55:2,7 55:24 57:9,10 57:14,15 60:23 persons 41:4	50:15 petitioner 1:4,17 2:4,10 3:8,24 4:6,24 29:12 34:20 48:13 56:12 picked 55:10 picture 6:19 11:20 17:6 38:3 54:4 pill 34:25 35:7 40:23 46:9 pillows 41:21 place 53:24 play 57:13 pleaded 41:8 pleads 61:18 please 3:10 29:9 point 13:12,15 17:15 19:22,25 23:14,18 39:11 48:16 49:22 53:5 57:1 58:15 61:7,11 pointed 44:8 45:25 points 57:2 pop 42:1 position 5:7 6:17 7:20 42:24 43:5 49:8 possess 23:3 24:3 30:18 possessed 19:11 27:20 possession 3:12 3:25 6:16 7:6,7 8:2,20 11:12 11:13,19 15:10 15:11,13,15,16 16:13 17:4 18:4,6,13,18 18:21 19:7,9 19:12,15 20:4 20:10 23:21,22 23:24 24:1,24	25:9,12 26:21 26:22 27:7,21 27:21,24 28:5 29:14 33:24,24 34:2 35:24,24 36:14,25 39:13 40:20 41:6,8 43:12,17,18 44:22,25 45:24 49:20 52:24 53:11,19 55:22 57:10,12 61:18 possessions 41:11 potentially 47:18 61:15 practical 59:7 59:22 60:21,22 practically 40:18 precisely 8:22 42:16 predicate 7:4 preliminary 27:13 presence 7:12 present 11:24 12:1 35:2 presented 40:20 presentencing 25:15 26:13 presumed 40:16 46:21 prevailed 34:20 previously 14:17 50:2 principal 9:2 principles 61:14 61:17 prior 6:7 9:17 9:21 12:20 14:15 15:11 17:6,9 20:9 25:5,13 26:12 27:8,8 40:16 44:7,11,17
---	---	---	--	--

46:4,20 47:9 47:15 48:2 50:3 54:8 56:24,25 57:9 probably 21:21 problem 4:5 20:5 40:12 problems 53:9 procedural 5:4 procedure 38:5 procedures 37:15 38:23,24 39:24 40:14 45:11,15,17 46:2 47:6,23 53:17 proceeding 14:13,14,16 16:22 46:16 57:5,5,6,8,9 proceedings 38:13 39:24 40:8,10 47:1 process 38:7,15 45:2 46:23 47:4 proof 44:10,13 propensity 49:8 proposition 15:9 proscribe 30:8 30:22 33:14 proscribed 33:11 proscribes 21:4 21:9 22:16,19 30:1,13,23,25 31:25 32:16,19 33:1 prosecute 18:9 18:17 prosecuted 10:16 11:6 14:8 29:15 57:11 prosecution 40:4	prosecutions 41:3 prosecutor 18:17,19 19:21 26:6 35:25 54:4,18,20 57:12 prosecutorial 19:1 prosecutors 18:9 40:19,24 41:1,2 prosecutor's 29:19 54:20,24 61:19 proven 25:21 40:5 proving 44:10 provision 8:17 12:17 18:10 27:4 39:1,1 42:18 45:8 51:8,10 58:24 60:3,20 provisions 16:8 16:13 39:6,8 50:14 punish 23:2 42:22 punishability 34:12 punishable 3:22 4:2 7:25 8:4 10:7,9,12 11:7 11:10 14:24 15:4,8 19:24 21:3,10 29:25 30:2,17 31:18 31:19 32:20 33:6,8 34:3,4,5 34:12 36:7,9 36:22,23 43:21 44:1,6,11,19 44:22,25 45:25 47:22 52:1,2,4 52:25 55:3,15	55:23 56:23 57:19 punished 15:1 29:16 30:25 35:15 36:10,19 49:13,14 55:14 56:1 punishes 17:25 punishment 12:19 27:5 30:20 45:13 48:11 49:22,25 punishments 44:21 49:12 purpose 52:20 purposes 11:24 12:1 18:2 24:25 27:19 28:1,2 29:12 44:7 50:17 pursuant 6:25 48:4 pussycat 41:20 42:12	quite 15:2 35:25 41:2 quote 3:19,20,21 3:23 33:5 57:18,20 <hr/> R <hr/> R 3:1 raise 24:10,13 26:14 raised 26:3,9 46:24 57:4 60:25,25 raises 28:13 46:13 raising 28:1 range 28:2 reach 24:4 reached 59:8 read 22:19 30:11,12,15,21 32:22 33:15 35:9,10 42:21 48:20 56:22 59:2 reading 20:6 21:6 35:8 60:21,23 real 40:21 60:3,7 reality 21:6 really 21:22 60:4 realm 25:22 reason 4:18 12:19 17:16 24:5 28:14 41:20 reasoning 26:23 reasons 11:11 16:19 60:8,9 60:14,16 rebuttal 2:8 29:2 56:11 57:2 receive 28:23 57:16 receives 27:8	recidivism 4:1 8:3,8 9:1,6,8 11:21,25 12:17 12:21 13:17 14:19,20 15:3 15:7,20,25 25:20 26:5 27:3 28:20 30:19,20 33:15 33:17,20 36:1 36:4,18,25 37:7 42:22 43:13 44:7,11 46:6 47:9 48:4 48:5,7,8,10,15 48:17,21 49:10 49:21 50:2,19 56:14,15 60:6 recidivist 8:16 8:18,20 10:14 11:15,16 13:15 14:7,10 15:1,4 15:10,12,14,14 15:16,18 16:8 16:12,14 17:2 17:4 18:3,6,9 18:13,17,21 25:9 26:21 35:18 37:25 39:20 40:22 45:24 46:11 48:12 49:12 50:6 53:7,19 54:19 55:20 57:14 60:24 61:20 recognition 18:25 recognize 8:12 recognized 33:20 44:3,24 51:1 recognizes 19:5 reenter 6:5 reentry 4:22 5:11,14,25
---	---	--	--	---

referring 30:7 47:22	require 59:6,17	21:21 46:20	scenario 35:2	33:18,21 38:22
refers 51:12	required 15:18	47:1,3,20	scheme 9:18	43:14
refrain 61:19	44:14 51:3	55:10,10	19:3 28:8	separate 6:5
regard 41:3	requires 26:1	ruled 44:17	school 35:3	16:13 19:11
regardless 6:7	45:3 55:15	rules 16:15	second 6:2 10:13	34:2 48:17,21
regular 23:2	requiring 38:6	ruling 61:15	12:3 14:13,16	separator 58:25
reinstatement	research 20:11	running 52:8	29:15 31:16,20	60:17
4:24 5:3,16,21	reserve 29:1		32:9 34:5	serious 29:11
related 41:14	resident 3:11,19	S	35:24 36:3	37:1 39:10
relevant 3:20	7:24	S 2:1 3:1	39:14 43:25	41:4,12,12
14:18 17:20	residents 3:21	Saharsky 1:18	44:4 51:24	50:16 54:3
26:4,17 34:13	respect 13:6	2:6 29:5,6,8	53:19 57:5,8	55:19
45:11	17:24 18:5,7	30:3 31:5,9,16	57:11 61:7,10	seriousness
relief 3:15,17	21:24 38:10	32:3,18 33:2	section 12:16	29:21 34:15
6:15,21 7:3,9	43:4 47:14	33:12,17 34:18	38:23 44:20	set 13:2 20:22
7:24 16:25	49:22 54:1,17	34:22 35:12	45:9,11,25	45:16
17:18 19:17	54:20	36:6,22 37:11	47:5,23 51:19	severely 49:14
20:1 37:21	Respondent	37:18,20 38:10	secured 46:5,10	shifting 45:19
38:22	1:20 2:7 29:7	39:5,22 40:25	see 5:17 20:21	short 61:11
relying 59:16	response 12:4	42:5,10 43:4	21:20,21 22:23	show 18:13
remaining 56:10	57:7	44:18 45:4,7	30:13 40:21	41:15
Remind 54:5	responses 18:16	46:13 48:6,21	42:14 43:15	shown 49:14
removability	result 4:10 27:5	48:24 49:11	47:12 49:22	shows 49:8
6:19 7:5	27:9 35:9	50:8 51:11	53:10 60:11	side 40:19,19
removable 7:2,6	retains 7:8	52:12 54:7,10	seek 3:14 7:9	similar 60:8,8
7:19	Rewis 42:15,25	54:15,23 56:8	37:21	similarly 7:17
removal 3:13,15	right 10:5,11	salient 27:18,25	sees 41:22	53:10 56:4
4:13,19,25 5:1	20:13 24:13,25	saying 5:10,10	sense 8:25 15:12	simple 20:10
5:11,16,19,21	25:1,2 32:14	5:12 23:15,17	sentence 11:16	24:23 26:22
5:21 6:7,22,23	33:12,23 34:21	29:16 45:23	11:20 13:11,16	40:20
6:25 7:24	37:19 39:22	54:20 60:5	13:19,20,22,23	simply 42:25
19:17 48:1	47:11,16 48:3	says 12:17 13:5	13:24 14:21,22	58:3
remove 35:4	48:23 50:8	20:4 21:2	15:19 20:23	situated 7:17
removed 4:24	51:14 56:19	22:22 30:16,19	22:1,2,11,16	53:10 56:4
5:15 6:25 7:14	58:8,11	33:5 34:9	25:6 26:8,9,10	situation 14:13
36:19 38:20	rights 38:15	44:21 50:1	27:9 28:18,21	23:19 25:19
render 17:10,17	rise 28:20	52:18	28:23,24 41:9	26:11 28:10
rendering 26:20	ROBERTS 3:3	Scalia 5:9,17	54:12 57:16,23	46:22 47:12,13
repeat 44:24	15:17 18:8	9:25 10:4,9,12	60:24,25	47:13 52:22
49:7	29:3 56:7	10:18,22 11:2	sentenced 12:19	57:4 59:11
repeated 36:13	61:10,24	12:4 13:20	20:16 57:17	situations 27:11
56:15	Rodriguez 49:12	14:2,23 15:6	61:5,8,20	skip 24:17
repeating 56:16	Rodriquez	16:2,6 33:18	sentencing 8:17	sleeping 46:9
report 25:15	48:25	57:21,24 58:6	9:18 25:3 26:7	small 34:24
26:13	role 25:14	58:8,11,14,16	27:6,7,19,25	soft 41:21
	rule 20:22 21:20	58:19,23 59:12	28:2,6,7,12,19	Solicitor 1:18
		59:15		

somebody 17:10 26:20 27:19	59:14,19 60:14 61:12	23:22 38:20 55:21	substance 17:22 18:5 30:1	14:3,4 17:11 17:21 21:19
somebody's 40:21	stage 49:22,25	State's 18:1 35:14	51:18	24:11,12 30:9
something's 36:16	stand 6:22,24	statistics 56:14	Substances 3:23 4:3 8:1,4,13	34:23 38:23
sorry 37:18 45:7	standard 44:13	statute 10:17 12:5,20,22	10:8,15 11:4,9	39:17 40:3
sort 18:23 23:19 47:14	stands 12:17	17:23 21:7,12	14:6,9,25	45:14
Sotomayor 8:6	state 8:7,11,17 8:19,21 9:7,13	21:23 22:13	19:24 21:4	talks 51:3,4
8:10,14,21 9:3	9:14,15,16,18	28:14 30:7,9	33:6,9 44:20	tat 61:6
9:12,20 24:22	9:21,24 10:1,3	30:12,13,13,15	52:1,3 57:20	Taylor 43:2
35:20 36:16	10:15,23 14:8	30:16,21,22,25	substantive 44:21 45:9	tell 35:21
37:2 44:5 45:2	14:15,17 15:18	31:25 32:1,16	suggest 46:4	tells 30:9 32:15
45:6 46:3	15:22 17:25,25	32:19,22,24	suggesting 23:25 50:9	ten 16:13
sought 40:4	18:7,8,16,16	33:1,14,16	summarize 55:18	term 11:24 13:5
54:13	18:19,25 19:1	35:8,9 42:14	suppose 20:8 24:23 27:17	terms 37:22 38:15 39:25
soul 41:21	19:4,15,20,21	42:15,21,22	sure 5:9 14:11	45:21,22 53:9
speak 40:25	19:22 20:4	44:6,8 47:10	18:15 23:16	53:18
special 47:20	21:3,6,11 22:2	49:19,23,24	24:16 35:25	test 59:19
56:15	22:16 23:1,2	50:5,5,9 56:18	40:1 43:9	Texas 30:25
SRI 1:16 2:3,9	24:1,23 25:3	56:20,22 59:22	52:21 59:14	42:21,21 53:7
3:7 56:11	25:20 26:24	statutes 9:7 12:10,23 30:7	system 25:11,11 26:6,19,20,23	54:4,20
Srinivasan 1:16	27:2,3,14,15	59:4	26:24 61:3	text 59:2,20,21 60:2 61:16
2:3,9 3:6,7,9	27:18 29:18,19	statutory 26:2 26:14 28:1,13		textual 58:23 60:17
4:4,15 5:13,18	29:25 30:12	35:14		Thank 3:9 29:3 56:7 61:12,24
5:24 6:3,9,11	31:10 32:1,16	stay 7:3		theory 44:15
6:23 8:9,14,24	32:18 33:1,13	stays 6:6		thereof 44:14
9:10,14,23	33:14,16,25	steal 32:1 42:1		thing 6:20 30:10 30:11 32:17,25
10:2,6,11,18	34:10,16,16	stealing 32:5		41:16 42:16,19
10:25 11:10	35:22 37:14	step 31:6		48:15 50:4
12:1,22 14:11	39:19,21 40:11	stick 46:8		51:8 53:2,11
15:5,21 16:4,9	40:13,19,24,25	stole 32:6		56:16 59:3
16:16,23 17:3	43:11,12,15,17	stops 49:5		things 14:12 25:23 58:5
18:15 20:13,18	43:25 44:2,14	straighten 43:2		think 4:17 5:5 6:11,11,18 7:4
20:24 21:1,8	45:22 46:4	strong 36:1,1		7:22 11:5 12:2
21:24 22:7,10	47:9 48:14	subject 3:13 11:3 13:23		14:12,12 15:22
22:15,19 23:5	49:20 50:9,11	14:20,21 36:17		15:24 16:17
23:9,12 24:9	50:19,20 53:16	48:11		17:16 18:23
24:15,19 25:1	53:17,18 55:1	submission 9:2		20:15,18 21:18
25:8,17,23	57:6 58:3 60:9	submit 56:6		21:25 22:1,7
27:12 28:12	states 1:1,13 3:13 7:12	submitted 61:25 62:2		22:24 24:7,13
29:4 47:17	12:10 15:24	subset 18:4		
56:9,11,19	16:7,12,16			
57:22 58:4,9	19:6,6,9,9,13			
58:12,15,18,22	19:18,19,20			

24:19 26:3,17 27:12 28:3 29:24 34:7 35:12 38:6 39:10 40:12 43:4 47:17,21 48:6,7 50:24 51:11,13 52:12 52:19,22 56:13 56:21 57:1,6 60:1 61:21 thinking 54:7 third 23:3 53:20 thought 6:4,4 37:23 39:20 43:20 45:10 49:7 50:16 54:3,6 61:16 three 32:10 33:16 threshold 4:5 thrust 16:10 ties 3:16 7:11 time 13:12 23:3 29:1 39:14 40:23 47:11 52:8 57:11 times 33:16 timing 52:14 tip 18:3,5 totally 26:25 38:3 43:2 trade 49:6 trafficking 17:22,25 18:1 18:4,11,14 41:6 51:17,18 51:20,25 treat 21:21,22 36:14 39:19 50:17 54:21 treated 29:11 36:9 38:19 53:3,12 55:17 treatment 50:11 treats 50:19,20	50:22 tried 43:1 triggered 15:19 true 19:2 55:5 59:25 trying 9:3,7 21:22 41:15 60:11 turn 19:1 30:15 turned 4:8 turns 19:4 32:5 two 3:12 11:11 12:11 14:12 16:18 18:16 25:23 27:10 29:13 31:10 34:8,24 35:22 36:24 37:6 39:12 41:11 51:13,16 52:9 53:11 55:22,25 57:2 58:5 60:16 two-part 43:23 two-step 31:5,8 31:9 type 46:23 51:21 52:23 types 39:23 U uncounseled 37:9 underlying 9:9 40:13 underneath 18:24 understand 4:6 4:9 5:10 12:3 23:24 34:19 40:2 61:3 understanding 23:15,17 understood 4:19 12:10 19:18 uniformity 55:9 unique 48:17,22	United 1:1,13 3:13 7:12 12:10 38:20 55:20 unlawful 6:2 use 30:5 37:25 40:14 60:2 uses 51:9 60:2 usually 41:5,8 56:13 U.S.C 12:16 13:4 V v 1:5 3:5 12:10 vacated 40:9 vagaries 27:1,14 vagary 25:20 valid 9:21 40:16 44:7,12,12,17 45:16,18 46:21 validity 40:5 44:10 variations 50:11 53:10 variety 7:15 vary 53:17 victim 58:21 victims 58:2 view 4:16 8:8 violence 42:4 54:8 W want 17:15 23:7 23:12,13 24:11 29:17 32:24 35:9 43:9 50:10 52:16,21 53:25 wanted 36:12 42:1 50:13 wants 48:13 52:13,17 Washington 1:9 1:16,19 wasn't 5:1 14:7	54:12 way 5:15 6:12 6:15 12:6 26:17 27:17 28:7,16 32:6 35:7,11,11,13 39:18 50:19 ways 12:11,23 weapons 41:21 Wednesday 1:10 we're 17:21 50:19 we've 16:2 wide 53:9 widely 53:17 word 14:23 30:5 36:8 42:22 59:12,16 60:19 words 10:7 20:6 21:6,11,13,14 23:1 29:23 32:22,24,25 60:18 work 10:7 working 49:15 world 21:13,23 42:2 worrying 41:16 49:17,19 worse 49:10 wouldn't 14:20 17:3,17 25:8 26:22 written 30:11 32:9,10,14,14 wrong 6:10 24:14 wrote 60:1 X x 1:2,8 Xan-something 35:1,6 Y year 13:20 20:10 20:11,17 23:3	28:24 30:18 52:10 years 18:12 20:5 35:17 52:10,16 55:19 Z zero 20:5 \$ \$10,000 51:7 58:1,17,20 59:1,6,9,18 60:6,12 0 09-60 1:5 3:4 1 1 13:20 28:24 1a 51:15 10 35:1 52:10 10a 33:3 10:14 1:14 3:2 11:15 62:1 1101(a)(48)(A) 13:4 15 52:16 1970 55:21 2 2a 13:3 20 34:25 35:17 55:19 2003 54:15 2010 1:10 21 12:16 39:7 28 30:18 29 2:7 3 3 2:4 31 1:10 4 4 56:9 43(b) 51:17
--	--	--	--	--

5				
5 20:5				
51 31:14				
56 2:10				
6				
6 44:24 45:24				
8				
8 13:4				
844 44:20 45:25				
844(a) 45:9				
851 12:16 38:23				
45:11 47:5,23				
9				
924(c) 51:19				